Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Digital Audio Broadcasting Systems And	)	MM Docket No. 99-325
Their Impact on the Terrestrial Radio	)	
Broadcast Service	)	
	)	

COMMENTS OF
ALLIANCE FOR BETTER CAMPAIGNS, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, BENTON FOUNDATION, CAMPAIGN LEGAL CENTER, CENTER FOR CREATIVE VOICES IN MEDIA, CENTER FOR DIGITAL DEMOCRACY, CENTER FOR GOVERNMENTAL STUDIES, COMMON CAUSE, NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, NEW AMERICA FOUNDATION, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., PROMETHEUS RADIO PROJECT

Cheryl Leanza, Esq.
Media Access Project
1625 K Street, NW Suite 1000
Washington, DC 20006
(202) 454-5683

Karen Henein, Esq.
Angela J. Campbell, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9545

Counsel for Public Interest Coalition

June 16, 2004

SUMMARY

A great opportunity may await the American public through the transition to digital radio. In the future, digital audio broadcasting could vastly increase the capacity for the transmission of radio programming and other services. The coalition of public interest organizations represented in these comments ("Public Interest Coalition" or "Coalition") commends the Commission for its forward-thinking *FNPRM* and endeavors to provide proposals to support the Commission's proactive exploration of public interest obligations for digital audio broadcasting. The Coalition's premise is that articulated by the Supreme Court in *Red Lion*, "[i]t is the right of the viewers and listeners …which is paramount …."[1] The Coalition strongly supports the creation of a second audio channel and other initiatives to expand the capacity of the public airwaves. Today, as always, many more people wish to speak than can be accommodated on the airwaves, and many audiences still await services targeted to their needs. Any technological initiative that can expand opportunities for public service must be fully explored.

The Coalition begins by describing how radio can best serve its communities. The Coalition presents a proactive vision of the goals we hope the FCC would like to achieve. The Coalition recognizes that at this early stage of digital audio development, it is better to start with our goals firmly in mind, and then construct a roadmap to achieve those goals. The Coalition hearkens back to historic aspirations for broadcasting in the hopes that the Commission does not lose sight of those ideals while developing the details of digital audio implementation.

Next, the Coalition advocates meaningful increased public interest obligations for terrestrial digital audio broadcasting. Digital audio broadcasters will use more spectrum and receive significant additional benefits through increased flexibility and increased opportunities

[1] *Red Lion Broad. Co. v. FCC*, 395 U.S. 364, 390 (1969).

for earning revenue. These opportunities will further increase, in all likelihood, upon transition to an all-digital radio environment. It bears emphasis that iBiquity's digital radio plans grant broadcasters permanent occupancy of the sidebands surrounding their current signals, and these sidebands will not be returned to public even in an all-digital environment. This more than justifies additional enhancements to public service. Moreover, uncertainty serves no one. Clear obligations help the public and help the broadcasters that are anxious to fulfill their obligations.

The Coalition outlines four areas in which the Commission should take action in order to adequately serve the public interest. First, the Commission should make explicit policy principles to serve as guideposts throughout the transition to digital audio. Specifically, the Coalition suggests the following six principles:

1) Free, over-the-air radio is a vital national interest that must be preserved and protected for civic, public safety, informational, and cultural reasons.
2) Broadcasters must add as much additional capacity for the provision of new and independent voices or for serving underserved communities as they add for other purposes, such as offering commercial services that increase format diversity or subscription services.
3) Radio must use digital technology to improve its offering of emergency information to all audiences no later than it deploys other new services.
4) Core statutory obligations must apply to all newly-created digital channels, and need modest alteration for a digital environment.
5) Benefits that accrue to digital audio broadcasters must be accompanied by specific public interest obligations enforced through Commission rules and renewal processing guidelines.
6) The Commission will utilize the technological development process to ensure that technology advancements support a broader benefit to the public.

Second, the Coalition identifies specific ways to implement the principles by suggesting the Commission should clarify the minimum public interest obligations that apply to every digital audio broadcaster. This includes applying broadcaster's statutory obligations to the full new digital audio capacity and ensuring that both localism and civic discourse are well served by

the new technology. In addition, digital audio broadcasters should document their compliance with these minimum requirements publicly.

Third, the FCC should develop a flexible menu of additional public interest obligations and impose additional obligations when a broadcaster chooses to implement subscription or other non-advertising based services. The Coalition strongly endorses the Commission's tentative conclusion that it should adopt policies that encourage more audio streams to enhance program diversity. This newly added digital capacity could be one of the only opportunities to add service for underserved audiences over a mass medium. The Coalition thus encourages the Commission to link new public interest obligations to subscription or other non-advertising based services. The menu should place the highest priority on offering capacity for audio programming to non-affiliated noncommercial programmers, "small disadvantaged businesses" (SDBs), and commercial programmers serving underserved audiences. The menu should also include options to offer additional news and public affairs programming, and to offer public interest data services.

Finally, the Coalition urges the Commission to adopt protections for consumer privacy, methods to collect appropriate and independent data on digital radio, and the adoption of a new rule for digital translators and boosters that promotes localism while preserving service to remote areas.

TABLE OF CONTENTS

SUMMARY ..... **II**

INTRODUCTION **2**

I. RADIO'S VIBRANT POTENTIAL **4**

II. THE COMMISSION SHOULD ADOPT POLICY PRINCIPLES TO GUIDE THE DEVELOPMENT OF DIGITAL AUDIO BROADCASTING. **8**

A. Principle One: Free, over-the-air radio is a vital national interest that must be preserved and protected for civic, public safety, informational, and cultural reasons. 9

B. Principle Two: Broadcasters must add as much additional capacity for the provision of new and independent voices or for serving underserved communities as they add for revenue-enhancing, such as offering duplicative commercial formats or subscription services. 9

C. Principle Three: Radio must use digital technology to improve its offering of emergency information to all audiences no later than it deploys other new services. 10

D. Principle Four: Core statutory obligations must apply to all newly-created digital channels and need modest alteration for a digital environment. 13

E. Principle Five: Benefits that accrue to digital audio broadcasters must be accompanied by specific public interest obligations enforced through Commission rules and renewal processing guidelines. 14

F. Principle Six: The Commission will utilize the technological development process to ensure that technology advancements support a broader benefit to the public 14

III. AMPLE JUSTIFICATION SUPPORTS THE COMMISSION'S AUTHORITY TO STRENGTHEN PUBLIC INTEREST OBLIGATIONS. **16**

IV. ALL RADIO BROADCASTERS MUST FULFILL MINIMUM PUBLIC INTEREST OBLIGATIONS. **19**

A. Local Programming Obligations Must Be Adjusted For The New Technology. 19

1. The Radio Market Has Not Adequately Served The Public Interest In Localism. 20

2. Local Civic and Electoral Affairs Programming Guidelines 25

3. Locally Originated Programming 27

B. Political Programming Obligations Must Apply, Adjusted For New Technology 28

1. Broadcasters play an essential role in the political discourse necessary for a functioning, effective democracy 28

2. Digital Audio Broadcasters Must Comply with the Statutory Mandates of Equal Opportunities and Reasonable Access on All Program Services 31

a. The FCC should clarify that Section 315(a) of the Communications Act requires digital broadcasters to provide equal opportunities to all political candidates on all program services. 31

b. The FCC should clarify that Section 312(a)(7) of the Communications Act requires digital broadcasters to provide candidates reasonable access to all program services. 34

C. Other Existing Statutory Rules Must Apply To Multicast, Subscription, And Other Services Made Possible By DAB 36
1. Station Identification Rules..... 36
2. Sponsorship Identification Rules 37
3. Cigarette Advertising Rules..... 38
4. Payment Disclosure Rules 39
D. The Transition Should Not Degrade the Quality of Freely-Available Radio Service. 41
1. Broadcasters Must Continue To Provide A Freely Available, High Quality Audio Channel. 41
2. Broadcasters May Not Dedicate Its Capacity In A Manner That Allows Excessive Commercialization. 42
3. Non-Commercial Licensees Should Offer One Non-Commercial Main Channel And Should Not Be Allowed To Offer Advertising On Any Program Offering. 43
E. Disclosure 46
V. BROADCASTERS THAT CHOOSE TO OFFER SUBSCRIPTION AND OTHER NON-ADVERTISER SUPPORTED SERVICES MUST FULFILL ADDITIONAL PUBLIC INTEREST REQUIREMENTS FROM A FLEXIBLE MENU. 47
A. The Menu Concept..... 49
B. Coalition Proposal..... 51
1. Menu Tier One: Broadcasters May Dedicate A Second Channel For an Independently-Produced Programming Stream. 54
a. Noncommercial Programming—LPFM, Cable Access Center, NCE programmers.55
b. Commercial Programming for Underserved Audiences Through Leasing to Small Disadvantaged Businesses. 57
c. Required Aspects of Agreements with Independent Programmers. 58
2. Menu Tier Two: Broadcasters May Offer Their Own Public Interest Programming Beyond the Core Obligations..... 59
a. Additional Programming on the Main Channel. 59
b. Broadcaster-Produced Programming Serving an Underserved Audience on a Secondary Channel. 60
3. Menu Tier Three: Broadcasters Can Choose To Provide Public Interest Services Via Non-Audio Programming. 61
a. Datacasting..... 61
b. Ascertainment. 62
VI. OTHER RULES..... 62
A. Consumers Must Be Protected by Opt-In Privacy Policies. 62

B. Data collection. 66
C. Boosters and translators. 68
CONCLUSION 70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service	)	MM Docket No. 99-325
	)	
	)	
	)	

COMMENTS OF
ALLIANCE FOR BETTER CAMPAIGNS, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, BENTON FOUNDATION, CAMPAIGN LEGAL CENTER, CENTER FOR CREATIVE VOICES IN MEDIA, CENTER FOR DIGITAL DEMOCRACY, CENTER FOR GOVERNMENTAL STUDIES, COMMON CAUSE, NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, NEW AMERICA FOUNDATION, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., PROMETHEUS RADIO PROJECT

The Alliance for Better Campaigns, American Federation of Television and Radio Artists, Benton Foundation, Campaign Legal Center,[2] Center for Creative Voices in Media, Center for Digital Democracy, Center for Governmental Studies, Common Cause, National Federation of Community Broadcasters, New America Foundation, Office of Communication of the United Church of Christ, Inc., and Prometheus Radio Project, by their attorneys, the Institute for Public Representation and the Media Access Project, respectfully submit these comments in response to the Commission's *Further Notice of Proposed Rulemaking on Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325 (rel. Apr. 20, 2004) (*FNPRM*).

[2] The Campaign Legal Center endorses the Coalition's comments in Section IV.B., Political Programming Obligations.

The coalition of public interest organizations represented in these comments ("Public Interest Coalition" or "Coalition") collectively represents a broad spectrum of the listening public. As such, the Coalition has a strong interest in ensuring a diversity of sources of information about important local issues, maintaining an informed electorate, meeting the educational and informational needs of children, and making sure that digital radio develops in a manner that serves the public interest.

INTRODUCTION

The Coalition's premise is that articulated by the Supreme Court in *Red Lion*, "[i]t is the right of the viewers and listeners …which is paramount …."[3] The Coalition applauds the Commission's determination to begin consideration of how digital audio broadcasters can serve the public interest. Even if the specific nature of all new services and the exact speed of deployment are uncertain, the Commission has sufficient information regarding the services digital audio broadcasters may offer to establish ground rules for public service.

Existing public interest obligations were developed under the analog system and are therefore shaped by the inherent limitations of that technology. The current rules, based on the assumption that a licensee provides a single channel of programming, will not satisfy the public's needs in the digital environment. The Commission has a duty to formulate and revise its public interest policies to reflect changed circumstances in the digital era.[4] In light of DAB's new capacity to serve communities in ways superior to analog, the Commission should adopt

[3] *Red Lion* at 390.
[4] *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 118 ("[the FCC] must adjust and readjust the regulatory mechanisms to meet changing problems and needs"); *accord Red Lion* at 394 (1969).

minimum standards and create incentives for digital audio broadcasters to ensure these new capabilities serve the public interest.

Both the Communications Act and good public policy demand that broadcasters meet public interest obligations with all of their services. The present public interest obligations, which were developed at a time when each audio broadcaster could broadcast only on a single, analog channel, are insufficient for the future. Adopting public interest requirements now will both provide helpful guidance to broadcasters in developing new services and ensure that the public benefits from the transition to DAB.

Furthermore, the public cannot wait for the public service owed to it by digital broadcasters while broadcasters reap the rewards of new technology. Uncertainty serves no one. Defining digital broadcasters' public interest obligations will neither stifle development of innovative services nor retard deployment. With the knowledge of what is expected from them, the best and most dedicated broadcasters can tailor their spectrum use accordingly. They can take the new obligations into account when developing business models and implementing new technologies. An attempt to impose public interest obligations after digital audio broadcasting has become entrenched, with business plans and technology finalized and deployed, would be more difficult to implement.

In these comments, the Coalition advocates for increased and meaningful public interest obligations for terrestrial digital audio broadcasters. Digital audio broadcasters will receive significant additional benefits through DAB, and will receive even more benefits when the Commission adopts a technical standard for all-digital broadcasting. With this new technology, digital broadcasters use more spectrum, have increased flexibility, and have increased opportunities to earn revenue. As such, the digital radio broadcasters will receive benefits that

should not only improve the mass media industry, but should also result in direct, concrete benefits for the listening public. It is the Commission's obligation to ensure that, in particular, members of the public who are not well-served by unrestrained commercial markets, whether they be people with low incomes, or individuals interested in programming to meet civic needs that is not attractive to advertisers, are served by the increased capabilities of digital audio broadcasting.

At the outset, the Coalition emphasizes its support – in the strongest possible terms – for the creation of a second audio channel. Today, as always, many more people wish to speak than can be accommodated on the airwaves, and many audiences still await service targeted to their needs. Any technological initiative that can expand opportunities for public service must be fully explored.

I. RADIO'S VIBRANT POTENTIAL

The Coalition begins here with a description of radio as it should serve the public interest. This proactive vision starts with our big-picture goals firmly in mind so as to better construct a roadmap to achieve them.

As the nation's radio stations begin to convert to digital, the Commission should reexamine the longstanding social compact between broadcasters and the American people. The evolution of digital radio will affect the quality of governance, intelligence of political discourse, diversity of free expression, vitality of local communities, opportunities for education and instruction, and many other dimensions of American life. As a free and ubiquitous medium, over-the-air radio has been and will continue to be a central, defining force in American society. Thus, the American people have a vital stake in the character of radio in the new digital era.

The framework for broadcasting was first articulated by Herbert Hoover: "The ether is a public medium, and its use must be for a public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, country-wide in distribution."[5] This principle has run through more than seven decades of broadcasting. The Radio Act of 1927 and the Communications Act of 1934 enshrined this principle in the mandate that broadcasting serve the "public interest, convenience and necessity."[6] Supreme Court rulings further proclaim the rights of viewers and listeners paramount over those of broadcasters.[7] "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[8]

It has been advanced by numerous FCC regulations designed to enhance diversity of expression, political discourse, children's programming, and other important cultural functions. And advancing the public interest remains the policy of the Commission, which, in 1960, clarified the elements necessary to meet the "public interest, needs and desires of a community ... 1) opportunity for local self-expression, 2) the development and use of local talent, 3) programs for children, 4) religious programs, 5) educational programs, 6) public affairs programs, 7) editorialization by licensees, 8) political broadcasts, 9) agricultural programs, 10) news programs, 11) weather and market reports, 12) sports programs, 13) service to minority groups, 14) entertainment programs."[9]

---

[5] Proceedings of the Fourth National Radio Conference, Washington, DC, Nov. 9-11, 1925 (Washington, DC: Government Printing Office, 1926), p. 7.
[6] Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162, § 4 (1927). *See also* 47 U.S.C. §§ 307(a), 309(a), 310(d).
[7] *Red Lion* at 390 (1969). *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994), vacated and remanded, 910 F. Supp. 734 (1995), aff 'd, 520 U.S. 180 (1997); *CBS v. DNC*, 412 U.S. at 117-18 (1973).
[8] *Red Lion* at 390.
[9] *En Banc Programming Inquiry Statement*, 44 FCC 2303, 2314 (1960).

The particulars of broadcasters' public interest obligations have varied over time, but the principle of public interest service has been, and remains, central to the defining charter of broadcasting. In a media environment increasingly characterized by concentrated ownership, commercially-driven content, and a lack of civic engagement, the Commission's determinations regarding whether public interest obligations of radio broadcasters should change in the new digital radio era represent a new stage in the ongoing evolution of the public interest standard: a needed reassessment in light of dramatic changes in communications technology, market structures, and the needs of a democratic society.

The Commission's rules should revitalize the compact between broadcasters and the American people. As this transition begins, the Commission has the opportunity to harness the increased channel capacity of digital radio, to encourage broadcasters and communities to work together to help citizens understand everyday issues in their communities, and to engage them in creating solutions. Well-crafted public interest obligations for digital radio broadcasters could benefit broadcasters and the community as a whole by leveraging media and community resources and by informing and energizing public dialogue. Local radio stations could become an essential local resource, convener, and platform for rich, community-relevant content and dialogue that meet local needs.

Radio programming has many incarnations. There is shock jock radio, top forty radio, retro "golden oldies" radio, talk radio, public radio. The Commission has the opportunity to fashion rules that ensure that across all formats there is still "community" in radio. Radio with the community at its center can deliver crucial information before and after an emergency, ongoing discussions of issues of local interest and importance, programming for non-English

speaking audiences, content created by local artists, shows targeted at underserved communities, and so much more.

Community in radio means embracing diversity by including voices not usually heard on the radio, developing programming that serves currently ignored segments of the community, adopting community advisory boards, and reaching out to the community for input. Community in radio is where music, culture, ideas and discourse can be shared in an environment designed to serve the needs of those not adequately served by commercial broadcasters today. Ultimately, community in radio is about storytelling: stories that are musical or spoken; stories that help us to understand ourselves, our neighbors, our communities and our world; stories that inspire thought, dialogue and action towards positive social change.[10]

The Coalition envisions markets of broadcasters serving communities of people. We see a wide range of choices for broadcasters that represent the diverse needs of their service areas. The minimum obligations and menu of public interest activities described below would hopefully produce a vast change in the radio we hear today. As a listener flips through stations in a market after the implementation of digital audio broadcasting, we imagine a lively morning program during drive time that allows small town residents to catch up on the mayor and the city council's activity; educational songs and exercise classes for children after their school day is over; widely-advertised community fora that include every demographic group's participation; four or five stations competing to scoop each other on important issues and success stories of the

[10] Today there are a hardy handful of broadcasters that wear the title of "community radio" with pride. These stations offer a sterling example of what radio across the country could sound like. For too long, serving the needs of underserved communities has only been considered seriously by these stations. For more information about the community radio movement, *see* http://www.nfcb.org, the National Federation of Community Broadcasters' web site.

community; programs that tap into the history of a community; on-air book club discussions; and dialogues about current art exhibits.[11]

Broadcasters – through programming that fulfills their public service obligations – should serve as channels of communication linking community members to the services they need and to each other. Through the reach of its signals, radio can connect local nonprofits, governments, schools, businesses, and community members to create an ongoing local dialogue to benefit everyone.

II. THE COMMISSION SHOULD ADOPT POLICY PRINCIPLES TO GUIDE THE DEVELOPMENT OF DIGITAL AUDIO BROADCASTING.

In an environment where the future uses of digital audio technology are not completely foreseeable, it is important that the Commission clarify its expectations for digital radio broadcasters as the technology, and in particular, as the business applications of the technology, develop. The Commission should adopt the following six governing policy goals to guide its future decision-making. With these policy goals in place, future decision-making will be simplified and marketplace participants will know what the Commission expects.

These policy principles offer guide posts for the Commission as it considers future proposals and services, offer a standard against which action can be judged, and allow the Commission to fulfill its statutory obligation to serve the public first and foremost.

[11] Other examples include a current project of the Robert Wood Johnson Foundation and the Benton Foundation connecting radio and television stations with community organizations to cover stories related to public health, and to expand on the news reporting with community outreach and tools to aid the public to act upon the information. Partner stations have covered topics including living with chronic illness in Appalachia, teen pregnancy in Latino communities, alcoholism and youth in the mid-west, and then connected community members with opportunities for community education and action. Sound Partners for Community Health, *available at*: http://www.soundpartners.org (last visited Jun. 14, 2004).

A. Principle One: Free, over-the-air radio is a vital national interest that must be preserved and protected for civic, public safety, informational, and cultural reasons.

Over-the-air broadcasting provides the little that is left of a shared conversation on common concerns, issues, and ideas. While new and growing media have added to the information flow received by most Americans, only over-the-air broadcasting continues to reach a wide swath of the public. For this reason, radio is the medium of choice for political advertising and marketing teams still seek to introduce mass market products via the airwaves. Radio offers a local medium that brings members of a local community together, and is generally a cheaper medium for both producing content and purchasing air-time. Radio receivers are inexpensive and uniquely portable. Radio is available to many listeners while they pursue other activities and thus can easily alert listeners to rapidly changing conditions. Free, over-the-air radio is a vital national interest that must be preserved and protected for civic, public safety, informational, and cultural reasons.

B. Principle Two: Broadcasters must add as much additional capacity for the provision of new and independent voices or for serving underserved communities as they add for revenue-enhancing, such as offering duplicative commercial formats or subscription services.

At this time, thousands of individuals would like to obtain access to the public via the public airwaves. The thousands of applicants for low power radio are just one example of whose views are excluded from the airwaves. Many excluded speakers are people of color, disabled people, women, and others who continue to be excluded as entrepreneurs, and ill-served as citizens. At this time, the FCC has not yet found a way to allow all of those citizens to speak

over the airwaves. New technology may some day make scarcity an antiquated notion, but until then, the FCC must remain committed to finding space for new speakers.

Presently, much of the projected use of new digital technology focuses on increasing the sound quality of radio, on providing auxiliary services such as data feeds that accompany the audio radio signal, or for fee-based services that will serve communities who purchase new equipment and pay a recurring fee. These services all focus on enhancing revenue. While it is understandable that the present initiative, driven by private interests, has focused on these aspects of new technology, it is *the Commission's* responsibility to ensure that private uses of technology by licensees are used to best serve *the public.* For example, National Public Radio has demonstrated that the technology can also be used to add new content streams that are available over the air, free for the public.[12] As detailed below, these new content streams could be used to offer diverse programming to the public. The Coalition therefore proposes that the Commission make clear that new uses for digital radio must be accompanied by improvements that will increase the diversity of programming heard by the public. The Commission should adopt a binding policy pronouncement that, as the technology develops, *broadcasters must add as much additional capacity for the provision of new and independent voices or for serving underserved communities as they add for revenue-enhancing, such as offering duplicative commercial formats or subscription services.*

C. Principle Three: Radio must use digital technology to improve its offering of emergency information to all audiences no later than it deploys other new services.

Because radio is a key medium for quick dissemination of information in an emergency situation, radio must use digital technology to improve its offering of emergency information to

[12] *FNPRM* at ¶ 20.

all of its audiences, including disabled listeners, no later than it deploys other new services using the technology. For broadcasters, this means the required deployment must also include staffing and operational mechanisms necessary to give emergency officials meaningful access to the public. For the Commission, this means adopting mechanisms to supply emergency information to digital broadcasters.

The same innovation moving ahead for In-band On-channel (IBOC) content must be applied to emergency alert services. The FCC has recently undertaken a commendable effort through its Media Security and Reliability Council to facilitate private and public broadcaster participation in offering emergency information to the public in a timely and accurate manner. The events of September 11, 2001 – including the failure of government officials to utilize the EAS system – clearly demonstrated that the system did not perform as needed during a time of crisis. Moreover, people with disabilities continue having difficulty gaining access to emergency information.[13] Broadcasting remains an important link in times of crisis, and access to public information via battery operated radios continues to be the primary link relied upon in wide-spread emergency planning documents.[14]

[13] For example, the Media Security and Reliability Council's final report on public safety included general admonishments that announcements should take into account people with disabilities. *MSRC Public Communications and Safety Working Group Final Report* (Feb. 18, 2004) at 13-14, *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244523A1.pdf (last visited Jun. 14, 2004).

[14] For example, the Department of Homeland Security includes in its basic checklist for an emergency kit, *Battery-powered radio with extra batteries, available at*: http://www.ready.gov/supply_checklists.html (last visited Jun. 14, 2004), and states, "the best thing you and your family can do during an emergency is to listen to messages from your local emergency managers, broadcast on radio or television," *available at*: http://www.ready.gov/faq.html (last visited Jun. 14, 2004).

The Commission has taken a laudable step in tentatively concluding that the EAS rules should apply to all audio streams broadcast by a radio station.[15] However, this tentative conclusion is not sufficient. The Commission's tentative conclusion does not address subscription services, which under the Commission's precedent is not included with in the term broadcasting.[16] Moreover, the Commission's tentative conclusion does not mention the need to offer services to disabled people. The Commission should adopt rules that ensure that anyone listening to any technology transmitted by a U.S. broadcast licensee (regardless whether it is used for "broadcasting" as the commission defines it) should offer emergency information via the emergency alert system.[17]

By adopting this principle the Commission should also ensure that improvements to emergency services include improvements to physical plant and staffing policies that allow emergency officials access to radio broadcast stations. Sadly, the inability of emergency officials to reach local citizens in Minot, North Dakota has become a well-known example of the present limits of broadcasting.[18] Digital radio promises to be the start of a new future for radio propelled forward by technological developments.

Broadcasters do not act alone in offering emergency alert services to the public; the Commission provides a framework and other functions to facilitate the transmission of information. As the FCC moves ahead with the MSRC, it should dedicate resources to ensure that information and technology will be available for the public listening to digital services.

---

[15] *FNPRM* at ¶¶ 37-38.
[16] *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).
[17] Adopting a specific obligation would be consistent with past Commission efforts to ensure access by people with disabilities. *See, e.g.*, 47 C.F.R. § 11.51 (d), (g), §73.1250.
[18] *See, e.g*, Jennifer Lee, *On Minot, ND Radio, A Single, Corporate Voice*, N.Y. TIMES at C1 (Mar. 31, 2003).

The Coalition articulates some specific obligations below, but asks that the Commission at a minimum adopt this principle to make clear that emergency information for all members of society is a top priority in communications policy.

D. Principle Four: Core statutory obligations must apply to all newly-created digital channels and need modest alteration for a digital environment.

The Commission is considering how statutory obligations should be applied to digital radio services. The Commission should assert that new digital services will not be treated differently than existing analog services – they all are subject to the same statutory and regulatory obligations. The change to a digital format ought to enhance public service, not provide an opportunity to evade it.

In particular, the Coalition is concerned that statutory obligations may be relegated to lower grade services. Statutory obligations must be modified for a digital environment and for digital services so that listeners and users of all parts of the digital transmission will benefit.

As the Commission recognizes, statutory obligations are not within the discretion of the Commission to eliminate from radio broadcaster obligations. In order to ensure that the spirit, as well as the letter of the law is carried out, the Commission should adopt as a guiding principle for this proceeding that it ensure that pre-existing statutory obligations are implemented in a way that is meaningful in the new digital environment, and provides benefits within the spirit of the law. For example, these laws were adopted to ensure the public has access to candidate speech, and has full information about the financial considerations behind the content they receive. Political programming, sponsor identification and payment disclosure rules all ensure that broadcast transmissions contribute to civic discourse and that listeners know who pays for the programming that they hear. These principles are relevant whether the listener pays for service

or receives a data transmission rather than an audio feed. The Commission has in the past inappropriately used its creativity to exempt new services from these important obligations.[19] The Commission should not repeat the error and should commit itself in this proceeding to furthering these obligations for digital radio, not diminishing them.

E. Principle Five: Benefits that accrue to digital audio broadcasters must be accompanied by specific public interest obligations enforced through Commission rules and renewal processing guidelines.

Benefits that accrue to digital audio broadcasters must be accompanied by specific obligations to produce benefits that accrue to the public and to underserved communities. These obligations should be enforced through Commission rules and renewal processing guidelines.

A wide range of service and technical benefits may arise from the transition to digital radio. While some benefits will accrue through the offering of commercial services, benefits that will not be produced by the commercial sector should be pursued simultaneously. These obligations should be flexible and provide appropriate incentives, including the use of new technology to expand capacity, but they should be mandatory, ensuring that the public receives a return on its investments with the broadcaster public trustees. There are many models that could fulfill this policy principle. The Coalition describes its proposal in detail *infra* in Part V.

F. Principle Six: The Commission will utilize the technological development process to ensure that technology advancements support a broader benefit to the public.

Until now, digital development has been driven by the private sector. The Commission's intention to rely on private initiative is not entirely problematic, particularly because popularity

[19] In its Subscription Video decision, the FCC fundamentally altered its definition of "broadcasting" to exclude any programming delivered through a subscription service, regardless of whether the originator of the programming is a Title III licensee and whether public airwaves are used. *Subscription Video,* 2 FCC Rcd 1001 (1987).

and acceptance by the commercial broadcast industry is critical to the deployment and development of new technologies. However, the Commission has taken a back seat in defining the minimum technical capabilities of the system. In one area alone, the adoption of a broadcast flag for digital content, has the Commission considered whether it should intervene in promoting particular public policy goals through technical means. In digital radio, the new technology could produce significantly more capacity for new programming if the Commission identifies increased capacity as a requirement before approving the technology. The original proposals of iBiquity included no additional capacity for audio programming in an all-digital format. It took the assertive participation of National Public Radio to develop a service offering that could provide the public with a second audio stream.

When so many formats are no longer available in major metropolitan areas, when underserved communities are growing, it is a travesty that this new technology could be created without a means to increase the number of broadcast streams available to the public or to enhance access for underserved populations. And it is even more tragic that the Commission authorized this technology without questioning the industry proposals.

The National Radio Standards Committee (NRSC) is to be commended for an extremely open membership process.[20] But thus far the participation of non-industry players has been limited.[21] Moreover, the Commission has not utilized the standard-setting process to influence the development of the technology to pursue public policy goals. The government must

[20] *See* http://www.nrscstandards.org (last visited Jun. 7, 2004).
[21] As the Center for Democracy and Technology has shown, public interest participation in standard-setting bodies can reap great benefits to the public. Davidson, Alan *et al., Strangers in a Strange Land: Public Interest Advocacy and Internet Standards, at*: http://intel.si.umich.edu/tprc/papers/2002/97/Strangers_CDT_to_TPRC.pdf; *Policy Impact Assessments: Considering the Public Interest in Internet Standards Development, at*: http://intel.si.umich.edu/tprc/papers/2003/248/CDT_Standards.pdf.

represent all listeners, particularly those who might not be well-served by commercial incentives, and thus ought to seek out participation when important decisions are being made. The hybrid radio technology has already been tested and debated, and standards will likely be adopted by the NRSC in the next year. But the Commission has not reviewed the all-digital technology and its standards lie farther in the future. The Commission should use its authority to facilitate participation at a technical level by members of the public without a commercial interest in digital radio technology to promote public interest development of technology.

III. AMPLE JUSTIFICATION SUPPORTS THE COMMISSION'S AUTHORITY TO STRENGTHEN PUBLIC INTEREST OBLIGATIONS.

In these comments, the Coalition supports an increase in meaningful public service with the transition to terrestrial digital audio broadcasting. Digital audio broadcasters will receive significant additional benefits from DAB, and will receive even more when the Commission adopts a technical standard for all-digital audio broadcasting. The Commission acknowledges that that the current standards only apply during the transition phase, and that new policies may need to be adopted when "the constraints of 'designing around' the legacy analog transmission standard [are] eliminated."[22] These new policies must give significant benefit to the public.

Several justifications support adoption of new and increased obligations. As outlined in the *FNPRM*, digital broadcasters will receive significant flexibility with the new technology and the opportunity to earn more revenue. They will use more spectrum to do so, and the public will be required to invest in new technology to benefit. As such, the digital audio broadcasters are receiving benefits that should not only result in benefits for one portion of the mass media industry, but will also result in direct, concrete benefits for the listening public. In particular,

[22] *FNPRM* at ¶ 15.

members of underserved groups are not likely to be served better by new technologies without additional government intervention. By definition, members of the public who are not likely sources of revenue will not be the likely recipients of new services developed in the competitive marketplace. In addition, members of the public who are well-served with respect to entertainment are not likely to be well-served with respect to civic matters, which are inherently not market-based.

Moreover, iBiquity's technology uses more spectrum, which causes significant consequences for other services. While the Commission uses the term IBOC, in reality the new service is not "on" the channel but around it. The digital radio technology approved by the Commission in the *Digital Audio Broadcasting R&O* allows significant use of side bands.[23] In analog radio technology, side bands are left empty as a cushion around the radio signal to prevent interference. The approved transition "hybrid" technology allows transmission that includes both analog and digital transmissions by surrounding the pre-existing analog signal with a digital signal.[24] This approach places the digital signals into the side bands. This technology thus allows broadcasters to engage in activity which is the equivalent of constructing additional buildings on their spectrum sidewalks, taking space they have not been previously allowed to use.

Placing the signals in the side bands has not been without cost. Most relevant, while the Commission originally proposed to authorize low power radio on both second and third adjacent

---

[23] *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, R&O*, 17 FCC Rcd. 19990, 20006 (2002) (*DAB R&O*).

[24] *DAB R&O*, 17 FCC Rcd at 19994, *and see, e.g.*, Paul J. Peyla, *The Structure and Generation of Robust Waveforms for FM In-Band On-channel Digital Broadcasting*, Figure 6, iBiquity Corp., *available at*: http://www.ibiquity.com/technology/pdf/Waveforms_FM.pdf (last visited Jun. 2, 2004).

channels, the Commission ultimately decided not to authorize programming on second adjacent channels because of concerns that it could threaten IBOC.[25]

It bears emphasis that the digital radio proposals grant broadcasters permanent occupancy of the sidebands surrounding their current signals and these sidebands will not be returned to public even in an all-digital environment. iBiquity's long-term projections for the digital technology do not forecast that the sidebands will eventually be relinquished. iBiquity's projections for the all-digital environment include removing the central analog signal, but not moving digital signals back toward the center of the band.[26] Instead the digital sidebands will increase in power, and the center of the band will be used for additional digital signals. Thus, the amount of spectrum that digital broadcasters occupy will have almost doubled.

While radio broadcasters have not been able to obtain additional spectrum in a second band like television broadcasters, this does not mean that they have not obtained additional spectrum. Moreover, the digital television transition contemplates an eventual return of the analog spectrum. If this analogy is to be applied to radio, digital broadcasters should vacate the side bands once a digital transition is complete. Neither the Commission nor incumbent commercial broadcasters seem to prefer this scenario. If the Commission chooses to pursue this alternative, however, it ought to require the return of adjacent sideband channels and take advantage of digital broadcasting's ability to transmit signals in close proximity to one another to

[25] *Creation of a Low Power Radio Service R&O*, 15 FCC Rcd 2005, 2241-46, ¶¶93-104 (2000); Statement of Commissioner Ness, *id*. at 2318-19; Comments of USA Digital Radio, Docket 99-25, at 6-7 (describing interference from LPFM if second adjacent—but not third adjacent – protections are lifted) (filed Aug. 2, 1999); *Creation of a Low Power Radio Service, MO&O, Order on Reconsideration*, 15 FCC Rcd 19208, 19219-220 (2000) (confirming link between digital terrestrial radio and protection of second adjacent channels).

[26] iBiquity Corp., *FM All-Digital IBOC Field Test Report* at 1, Figure 2, (Feb. 1, 2002); iBiquity Public Interest Presentation (Jun. 3, 2004).

offer new licenses to the public. Regardless, this change in allocation justifies a change in obligation.[27]

IV. ALL RADIO BROADCASTERS MUST FULFILL MINIMUM PUBLIC INTEREST OBLIGATIONS.

The Coalition proposes that digital audio broadcasters be subject to existing broadcasting rules applied to all new digital offerings, as well as the added minimum public interest obligations described below.[28]

A. Local Programming Obligations Must Be Adjusted For The New Technology.

In the *FNPRM*, the Commission asks how digital technology can be used to promote localism in the terrestrial radio service.[29] Specifically, the Commission asks whether that local component should carry news or public affairs programming and whether there should be a minimum local origination requirement.[30] The Coalition stresses that the main public interest responsibility of a broadcaster is to air programming responsive to the informational needs of its community.[31]

---

[27] As another alternative, in the ITFS docket the FCC asked whether a "restructuring" of the band could be considered a sufficient change in the existing licenses to bring the change within the ambit of Section 309(j)(2) so as to require auctions of those licenses. While it remains to be seen whether the Commission adopts this approach in that proceeding, it would seem that the changes to ITFS, which included changing the service from analog or digital to a purely digital service and allowing new flexibility for mobile services and mobile build outs, would be very similar to the present proceeding. *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 18 FCC Rcd. 6722, 6820 (2003).

[28] These minimum requirements and other broadcasting rules should apply to all newly created digital services and opportunities, but not to existing SCA services.

[29] *FNPRM* at ¶ 34.

[30] *Id*.

[31] *See* 47 U.S.C. §§ 336(a), 307(a), 309(a), (e); *CBS v. FCC*, 453 U.S. 367 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 364 (1969); *Office of Communication of United Church of*

1. The Radio Market Has Not Adequately Served The Public Interest In Localism.

As the Commission acknowledges, "The concept of localism was part and parcel of broadcast regulation virtually from its inception."[32] However, localism in the radio market has experienced a steady decline. Congress lifted the ownership limits on local radio stations in the Telecommunications Act of 1996, and as a result, massive consolidation has completely reshaped the industry. Broadcast radio has become dominated by a few vertically integrated corporations with publicly traded shares valued in the billions of dollars. This consolidation has done more than ensure the profitability of these group owners. It has proved a catastrophe for the principles of localism and accountability to the community which should form the bedrock of the terrestrial broadcasting service. Nationally-distributed, vertically-integrated offerings have displaced local and regional programming as a consequence of consolidation.

The loss of local news and local programming surrounding events and issues of importance to them is critically important. Increasingly, what little news one finds on the radio dial comes from a single centralized source thousands of miles away. Radio personalities pretend to discuss local news, make commentary on local events, critique local night life and hot spots, all without ever setting foot within a thousand miles of the transmitter.[33] Regional news bureaus located in distant cities present local newscasts without having reporters located within hundreds of miles of the city they purport to cover. Thus, Clear Channel audiences in Toledo

---

Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 207, *cert. denied*, 350 U.S. 1007 (D.C. Cir. 1956).

[32] *See Deregulation of Radio*, 84 FCC 2d 968, 994 (1981).

[33] Suzanne C. Ryan, *Local Anchor Feels Our Pain From Afar*, Boston Globe (Jan. 15, 2004). *See*, *e.g.*, Hearing Before the Senate Committee on Commerce, Science and Transportation, "Media Ownership: Radio," January 30, 2003 (Statement of Jenny Toomey, Executive Director, Future of Music Coalition). *See also* Anna Wilde Matthews, *From a Distance: A Giant Radio Chain Is Perfecting The Art of Seeming Local*, The Wall Street Journal, A1 (Feb. 25, 2002).

and Lima, Ohio receive newscasts produced in Columbus. And Corpus Christi residents heard news of a hurricane from a Clear Channel Bureau located at least a hundred miles inland.[34]

Even when local radio newscasts originate locally, their contribution to the diversity of ideas is minimized when, as is increasingly the case, they are outsourced to a single contractor serving many or most of the stations in a community:

> Many radio stations that offer periodic headline reports and that even promote themselves as "newsradio" rely completely on syndicated services such as the Metro Networks and Shadow Broadcasting Services, which use a single announcer to service eight or ten stations in a market. These syndicated services employ few if any reporters and do not bother to subscribe to the AP or other wire services. Instead, they merely cannibalize local newspapers and cable news channels.[35]

Most disturbingly, national group owners have practiced deceptions to make programming appear local while in fact distributing a national service. Radio conglomerates prepare detailed primers to help radio personalities pretend familiarity with locals they have never visited. References to time, date and location are stripped from guest interviews so that they can appear to be "live" when aired in distant locals. Listeners are urged to "call in" to pre-recorded shows.[36]

Indeed, as described by one Clear Channel executive, radio conglomerates are pursuing a dedicated strategy designed to transform terrestrial radio into a national service with modest local "flavor" added at the local licensee. In an interview with *The Wall Street Journal* in 2002, the chief executive of Clear Channel's radio unit compared operating local radio stations to

---

[34] *See*, Deborah Potter, *A Vast Wasteland*, American Journalism Review, November, 2000; Marc Fisher, *Blackout on the Dial*, American Journalism Review, June, 1998.
[35] Lawrence K. Grossman, *The Death of Radio Reporting*, Columbia Journalism Review, September/October 1998. *See also* Andrew Jay Schwartzman, *Viacom-CBS Merger: Media Competition And Consolidation in the New Millennium*, 52 Fed. Comm. L.J. 513, 515-16 (2000).
[36] *See, e.g.*, Jeff Leeds, *Clear Channel Communications Clearly a Radio Giant: Deregulation Brings Rapid Expansion; Critics Air Concerns*, The San Louis Obispo Tribune, D1 (Feb. 28, 2002).

McDonald's franchises. "You may in some parts of the country get pizza and in some parts of the country get chicken, but the Big Mac is the Big Mac."[37]

Commercial terrestrial broadcasting has become so centrally controlled that it has threatened the most basic of local functions that broadcasters perform– real time notification of the public of emergency information critical to public safety.[38] Consolidation and centralization has dangerously undermined radio's role as a critical lynchpin in local health, safety and security.

This transformation did not take place overnight, nor did it go unnoticed. Congress has held numerous hearings on consolidation in radio and the disappearance of localism.[39] In 2002, a diverse coalition of unions and trade organizations – ranging from the Recording Industry Association of America to the National Federation of Community Broadcasters – sent a letter to the FCC requesting an investigation of the rise of payola-like practices and the increases in centralized decision making regarding content by national group owners.[40] In the fall of 2002, the Future of Music Coalition released a study documenting massive listener dissatisfaction with

---

[37] Anna Wilde Matthews, *From a Distance: A Giant Radio Chain Is Perfecting The Art of Seeming Local*, The Wall Street Journal, A1 (Feb. 25, 2002).

[38] *See infra* n.18 describing the notorious Minot example.

[39] *See, e.g., Broadcasting and the Public Interest: Hearing Before the Senate Committee on Commerce, Science and Transportation,* 108th Cong., 1st Sess., (2003); *Media Ownership Rules and FCC Reauthorization: Hearing Before the Senate Committee on Commerce, Science and Transportation,* 108th Cong., 1st Sess. (2003); *State of Competition: Hearing before the Senate Committee on Commerce, Science and Transportation,* 108th Cong., 1st Sess. (2003); *Media Consolidation: Hearing Before the Senate Committee on Commerce, Science and Transportation,* 107th Cong., 1st Sess. (2001); *Telecommunications Mergers: Hearing on the Telecommunications Merger Act of 2000 Before the House Subcomm. on Telecommunications Trade & Consumer Protection,* 106th Cong., 2d Sess. (2001).

[40] "Joint Statement of Current Radio Issues," May 24, 2002, *available at* http://www.futureofmusic.org/images/radioissuesstatement.pdf. An update restating many of these issues was sent to the FCC in May 2003.

terrestrial radio.[41] In 2003, legislation was introduced in both the House and the Senate to address the erosion of localism and the increasingly anticompetitive conduct of large group owners.[42]

These warnings of an increasing disconnect between commercial terrestrial broadcasters and their local communities fell on deaf ears at the Commission until the Commission undertook its *2002 Biennial Review*. In more than 2 million comments, citizens from across the country documented the continuing decline of localism in broadcasting.[43]

As a consequence of the popular outcry engendered by the *2002 Biennial Review*, Chairman Powell announced in August 2003 that the Commission would form a special task force to investigate the question of whether terrestrial broadcasters (both radio and television) continued to serve local communities. As the Chairman explained:

> During the [*2002 Biennial Review*] and in the months that followed ...we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns...and we are going to tackle it head on.[44]

The Chairman authorized the task force to "conduct studies to rigorously measure localism" and make recommendations to the Commission on how to foster and improve localism among broadcasters. The Chairman further stated his belief that the most direct way of accomplishing localism objectives is to "include things such as public interest obligations, license renewals, and protecting the rights of local stations to make programming decisions for

---

[41] Peter DiCola & Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians*, Future of Music Coalition Study, 79-100 (2002) ("FMC Study").
[42] "Competition in Radio and Concert Industries Act of 2003," S. 221(Cong. Daily S1668) (January 28, 2003); H.R. 1763 (Cong. Daily H3303) (April 10, 2003).
[43] *2002 Biennial Review Order*, Dissenting Statement of Commissioner Adelstein, 18 FCC Rcd at 13977.
[44] *FCC Chairman Launches 'Localism In Broadcasting Initiative,'* FCC Press Release (August 20, 2003).

their communities."[45] The Chairman also promised that, by September 2003, the Commission would issue a Notice of Inquiry on localism. Among other issues, the Chairman explicitly identified voice tracking as a matter for the NOI and the task force.

Sadly, the Commission has proceeded more slowly than expected. As of the date of this writing, the Localism NOI has yet to be released. Nevertheless, even at this early stage of the Commission's investigation, evidence continues to mount that radio broadcasters do not provide satisfactory local service. At localism hearings that have occurred to date, local audiences protested the homogenization of the airwaves and the continuing disconnect between commercial terrestrial radio broadcasters and their audiences.

Studies of radio listeners' habits also support the conclusion that the Commission must take this opportunity to develop regulations that embrace localism in the era of digital audio broadcasting. For example, the American Radio News Audience Survey found that radio listeners believe that radio news is an easy and relevant method of information exposure.[46] Most news followers expect radio news to provide information about local events. More than 93 percent of respondents agreed that an important function of radio news is to inform them about what is happening in their community, and three-quarters (78%) agreed that an important function of radio is to identify problems in the community.[47]

In addition, most news followers who listen to radio *disagree* that radio news broadcasts are annoying because they interfere with regular programming (77%). In fact, 41 percent of respondents agreed that radio news broadcasts are too short to provide useful information.

---

[45] *Id*.
[46] *See* Radio-Television News Directors Association and Foundation, *The American Radio News Audience Survey*, *available at*: http://www.rtndf.org/radio/perception/ (last visited Jun. 11, 2004).
[47] *Id*.

Another shortcoming of radio news broadcasts is their perceived repetitiveness. Three-quarters of news followers who listen to radio agreed that news broadcasts on radio repeat the same stories over and over again.[48]

In order to satisfy local needs, the Commission must implement policies that will increase the length of radio informational programming, decrease repetitiveness, and increase the local issues addressed by the programming. The following is a processing guideline for the general public interest portion of broadcast license renewal applications. Licensees that meet both of the following guidelines will receive staff level approval of the general public interest portion of their license renewal application; applications of licensees not meeting all of the following guidelines will be referred to the Commission for review. In addition, any listener may file a complaint with the Enforcement Bureau alleging that the licensee has failed to comply with the terms of this processing guideline. If, on the basis of listener complaints or staff review, the staff determines that the licensee consistently falls significantly below the minimum set forth here, the staff shall have the authority to direct the early filing of license renewal applications or take other enforcement measures as may be appropriate.

2. Local Civic and Electoral Affairs Programming Guidelines

To receive staff level approval, a licensee shall air a minimum number of hours per week of qualifying local civic or electoral affairs programming on the most-listened to (primary) channel they control/operate during drive-time and peak listening periods.[49] The primary channel should be free over-the-air standard channel.

---

[48] *Id*.

[49] Further study must be performed to assess how many hours of this type of programming will be appropriate in the context of radio.

In addition, to the degree that a broadcaster multicasts additional over the-the-air programming streams, the licensee must air a minimum amount of qualifying local civic or electoral affairs programming on those channels. Licensees shall have the flexibility to decide how to allocate their local civic and electoral affairs programming among their various non-primary channels; for example, a licensee may decide to run most of its non-primary channel local civic and electoral affairs programming on one designated local news or public affairs channel.

Qualifying programming must meet the definition of either local civic programming or local electoral affairs programming. Local civic programming is designed to provide the public with information about local issues. Local civic programming includes broadcasts of interviews with or statements by elected or appointed officials and relevant policy experts on issues of importance to the community, government meetings, legislative sessions, conferences featuring elected officials, and substantive discussions of civic issues of interest to local communities or groups.

Local electoral affairs programming consists of candidate-centered discourse focusing on the local, state and United States Congressional races for offices to be elected by a constituency within the licensee's broadcast area. Local electoral affairs programming includes broadcasts of candidate debates, interviews, or statements, as well as substantive discussions of ballot measures that will be put before the voters in a forthcoming election. Programming that focuses on the "horserace" aspects of an election does not qualify as local electoral affairs programming. Programming that is primarily concerned with the political strength or viability of a candidate or ballot issue; that focuses on a candidate or ballot issue's status in relation to polling data, endorsements or fundraising totals; or discusses an election in terms of who is winning or losing

is considered "horserace." Public service announcements and paid political advertisements do not qualify as local civic or electoral affairs programming.

The majority of local civic and electoral affairs programming must be aired during drive time and peak listening periods. At least 75 percent of the required minimum must be "first-run programming" by the broadcaster. A licensee holding multiple licenses within the same area (as defined by the Commission's rules permitting multiple ownership) may not fulfill its requirements by duplicating original "first run" programming on its stations. Each station licensed within a market must fulfill the public interest guidelines by providing the public with a unique perspective. Programming aired during regularly scheduled newscasts on the primary channel that otherwise meets the definition of qualifying local civic or electoral affairs programming may be counted towards the licensee's weekly minimum.

3. Locally Originated Programming

To receive staff level approval, a broadcaster shall air locally produced independent programming for a minimum percentage of the primary channel's peak listening periods. This 20 percent obligation would include programming that meets the minimum civic and electoral affairs programming in the first guideline.

Programming not produced by the licensee and which is produced by an entity providing programming to more than one licensee is not locally produced independent programming. If an entity providing programming to more than one licensee owns or controls more than a one-third financial interest in the program, acts as the distributor of such program in syndication, or owns the copyright in such program, the national radio owner will be considered to be the producer of that program for the purposes of this processing guideline.

To further the public interest in diversity of viewpoints and localism, broadcasters are encouraged to program on their non-primary digital channels additional independently produced programming, including locally produced independent programming.

B. Political Programming Obligations Must Apply, Adjusted For New Technology

1. Broadcasters play an essential role in the political discourse necessary for a functioning, effective democracy.

The Supreme Court,[50] the Commission,[51] and recent studies[52] have recognized that broadcasting is vital to public discourse. The Supreme Court has stated that the obligation to provide information to the public is so critical that broadcasters must offer a breadth of coverage on vital public issues, such as voting and elections, to allow access to a diversity of information from which citizens can make educated decisions.[53] Even more importantly, the Commission has emphasized broadcasters' role as a dominant source for local news and information.[54] The

---

[50] *See generally McConnell v. Fed. Election Comm'n*, 124 S.Ct. 619 (2003); *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998).

[51] "Television and radio stations, both commercial and noncommercial, are important media for news, information, entertainment, and political speech." *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13765 (2003).

[52] *See* Andrea M.L. Perrella, *The Political Influence of Talk Radio* (Université de Montréal, 1995) ("Talk radio has played a vocal role during the 1992 presidential election and the 1994 mid-term elections, with many people both in and out of politics attributing the Republican Party's 1994 election sweep to buoyant conservative talk-radio hosts."); Amy Ridenour, President of The National Center for Public Policy Research, Press Release (Nov. 20, 2002) ("Talk radio is America's town hall"). *See also* Lear Center Local News Archive (USC Annenberg School and the University of Wisconsin), *Local TV News Coverage of the 2000 Primary Campaigns*, (Jun. 13, 2000); *Local TV Coverage of the 2000 General Election*, (Feb. 5, 2001); and *Local TV News Coverage of the 2002 General Election*, (Oct. 16, 2002), *available at:* http://www.learcenter.org/html/publications/?c=online+publications (last visited Jun. 14, 2004).

[53] *See Red Lion* at 393; *Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 180-81. *See also McConnell*, 124 S.Ct. 619.

[54] *Review of the Commission's Regulations Governing Television Broadcasting*, 16 FCC Rcd 1067, 1074 (2001). *See also 2002 Biennial Regulatory Review- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the*

Supreme Court likewise understands the magnitude of this influence, noting in one case that a broadcast licensee's decision "may have determined the outcome of [an] election."[55]

Not only is political programming essential to the public, it is crucial for candidates to convey their messages. "[I]t is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."[56]

The participation of radio in the political arena becomes even more important when one considers that television coverage of political issues has never been lower. A study done by the Annenberg Center in the 2002 election found that 56 percent of all local news stations carried no coverage that mentioned candidates or campaigns in the period right before the election.[57] Any available coverage was of poor quality. The average length of a soundbite by a presidential candidate on the network evening news went from 43 seconds in 1968 to less than 8 seconds in 2000.[58] Also, in the 2000 election, 71 percent of election coverage on network evening news dealt with who was winning and who was losing rather than substantive issues.[59] A 2003 study found that just four-tenths of one percent of network television programming is devoted to local

---

Telecommunications Act of 1996, 17 FCC Rcd. 18503 (2002), *Study 8, Consumer Survey on Media Usage, Neilsen Media Research*, Sept. 2002.

[55] *Arkansas Educational Television Commission*, 523 U.S. at 685; *See also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1966).

[56] *CBS Inc. v FCC*, 453 U.S. 367, 396 (1981) (internal quotes omitted).

[57] Lear Center Local News Archive (USC Annenberg School and the University of Wisconsin), *Local TV News Coverage of the 2002 General Election* (Oct. 16, 2002) *available at*: http://www.learcenter.org/html/publications/?c=online+publications (last visited Jun.14, 2004).

[58] *Campaign 2000 Final: How TV News Covered the General Election Campaign*, Media Monitor, The Center for Media and Public Affairs (2000).

[59] *Id*.

public affairs. By comparison, 9.9 percent is reality or game shows, and 7.9 percent is sporting events.[60]

Other studies indicate that thousands continue to rely on radio broadcasts for campaign and election information. Seventeen percent of those surveyed by Pew Research Center for the People and the Press indicated that they regularly learn something about campaign or the candidates from talk radio, with 29 percent sometimes turning to radio for that information. Fourteen percent regularly obtained their information from NPR, and an additional 21 percent sometimes listen to NPR.[61] Similarly, the American Radio News Audience Survey found that 33 percent of respondents were very interested in news about politics, elections, and government on the radio.[62] Moreover, preserving political discourse on the radio is more important than ever as television broadcast coverage of campaign and election issues is dramatically declining.

Because of the reliance by the public and candidates upon broadcast programming, particularly local programming, sufficient election coverage is essential to serve the public interest. The Commission must act to preserve and advance political discourse in digital broadcasting.

---

[60] *All Politics is Local, But You Wouldn't Know it by Watching Local TV: Less Than One Half of One Percent of Programming is Local Public Affairs* (2003), Alliance for Better Campaigns, *available at*: http://www.bettercampaigns.org/reports/display.php?ReportID=12 (last visited Jun. 14, 2004).

[61] Pew Research Center for the People and the Press (Jan. 11, 2004). *Perceptions of Partisan Bias Seen as Growing- Especially by Democrats*. Online at www.pewinternet.org/reports/pdfs/PIP_Political_Info_Jan04.pdf .

[62] Radio and Television News Directors Foundation (2001); *The American Radio News Audience Survey***,** *available at* http://www.rtndf.org/radio/foreword.htm.

2. Digital Audio Broadcasters Must Comply with the Statutory Mandates of Equal Opportunities and Reasonable Access on All Program Services.

The *FNPRM* asks how a broadcaster's obligations to provide equal opportunities and reasonable access to candidates translates into the digital environment.[63] Simply put, these rules should apply across the board to all newly-created program services. Any other interpretation of the statutory mandates of candidate access rights would conflict with the letter of the law and the Commission's implementing rules and precedent.

a. The FCC should clarify that Section 315(a) of the Communications Act requires digital broadcasters to provide equal opportunities to all political candidates on all program services.

Section 315(a) of the Communications Act requires a broadcaster that permits any political candidate to use its facilities to provide equal opportunities to all other such candidates for that office.[64] "The basic purpose of section 315(a) is to permit the 'full and unrestricted discussion of political issues by legally qualified candidates.'"[65] Section 315(a) "[p]revent[s] discrimination between competing candidates by broadcasting stations and cable operators."[66] Under the Commission's rules, equal opportunities means that a broadcaster must "make available periods of approximately equal audience potential to competing candidates to the extent that is possible."[67] In addition, any rules the Commission adopts must fulfill the mandate

[63] *See FNPRM* at ¶ 36.
[64] 47 U.S.C. § 315(a).
[65] *Becker v. FCC*, 95 F.3d 75, 82 (D.C. Cir. 1996) (citing *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 529 (1959)).
[66] *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 69 F.C.C. 2d 2209, 2216 (1978) ("*Political Primer 1978"*).
[67] *Political Primer 1984*, 100 F.C.C. 2d 1476, 1505 (1984).

of 47 U.S.C. §315(a), which includes, *inter alia*, an obligation to cover controversial issues in the community as well as a general obligation to serve in the public interest.

Thus, any use by a candidate of any program service provided by a digital audio broadcaster triggers a competing candidate's rights, and the licensee must then provide any competing candidate for that office an equal opportunity to use that service. A contrary application of the statute would allow broadcasters to discriminate among candidates for the same office. For example, if a broadcaster provides candidate A with the use of its "primary" channel, it must allow candidate B use of programming facilities and time that will reach substantially the same audience that was reached by candidate A. The digital broadcaster cannot relegate candidate B to a channel or time slot that reaches a substantially smaller or significantly differently composed audience, which would constitute illegal discrimination toward candidate B under section 315.[68] The same rationale applies if the broadcaster provides access to candidate A on the licensee's ancillary pay program service. To comply with section 315, the digital broadcaster must provide candidate B with an equal opportunity on a pay channel that reaches a substantially similar audience at the same price.

In addition, "the power to channel" not only confers "on the licensee the power to discriminate between candidates, it can force one of them to back away from what he considers to be the most effective way of presenting his position on a controversial issue lest he be deprived of the audience he is most anxious to reach."[69] This danger is even greater in the digital environment where a broadcaster may potentially have an array of program streams to channel a

[68] *Cf. Becker*, 95 F.3d at 84 (discussing how if a licensee channels one candidate's message to "prime time" and the second candidate to "broadcasting Siberia," the latter would be denied the equal opportunity guaranteed by section 315).
[69] *Becker*, 95 F.3d at 83.

candidate's message. Thus, it is imperative that the Commission require all digital broadcasters to offer equal opportunities to all candidates on all their program services.[70]

Furthermore, the Commission should enforce and strengthen political advertising rules related to lowest unit charge. Lowest unit charge regulations enable all legally qualified candidates to receive the lowest advertising rate for the same class, amount of time, and daypart that a broadcast station provides to its commercial advertisers immediately before primary and general elections.[71] If a station preempts a political advertisement, the station provides a "make good," or an offer to run the advertisement at a different time.[72]

The lowest unit charge policies have several problems, however, and the Coalition urges the Commission to take this opportunity to address these issues before the completion of the digital transition. In 1990, for example, the Commission found that although political advertising is entitled to the lowest unit charge, many candidates purchased higher-priced fixed times because lower cost time slots could be preempted.[73] "[A]t a majority of the stations, political candidates have paid higher prices than commercial advertisers because sales techniques encouraged them to buy higher-priced classes of time ... Such practices frustrate the intent of Congress as reflected in the 1972 amendment of Section 315(b)."[74] In 2000, the Alliance for Better Campaigns' study of ten major markets found that candidates on average paid 65 percent

[70] "It was the intent of Congress to insure complete freedom of expression by political candidates, and therefore the no-censorship provision of Section 315 prohibits *any interference, direct or indirect, with such expression*." *D. J. Leary*, 37 F.C.C. 2d 576, 578 (1972) (emphasis added).
[71] *See* 47 U.S.C 315(b), 47 C.F.R. § 73.1942, § 76.206, § 76.1611, § 25.701(c).
[72] *Id*.
[73] *Mass Media Bureau Report on Political Programming Audit*, FCC LEXIS 4700, 68 Rad. Reg. 2d 113 (1990).
[74] *Id*.

more than the lowest unit charge for advertising time.[75] In addition, broadcasters often increase the lowest unit charge during peak election season. A 2002 study conducted by the Center for the Study of Elections and Democracy found that candidate broadcast advertising costs increased from $454 in the week of June 30-July 6 to $886 in the week of November 3-9.[76]

The Coalition proposes three steps for the Commission to strengthen the lowest unit charge rules. First, the Commission should require written and clear disclosure of make good policies so that candidates understand their rights. Second, the Commission should implement rules that restrain broadcasters from increasing the lowest unit charge during an election. Third, the Commission should clarify that its lowest unit charge rules apply to both multicasting and subscription services.

b. The FCC should clarify that Section 312(a)(7) of the Communications Act requires digital broadcasters to provide candidates reasonable access to all program services.

The Commission must also clarify how § 312(a)(7) of the Communications Act applies to DAB. Section 312(a)(7) requires broadcasters to provide federal candidates with "reasonable access" to their facilities during political campaigns. This law ensures that "candidates for Federal elective office are given or sold reasonable amounts of time for their campaigns."[77] The Commission has set forth several general principles that seek to clarify what is considered

[75] Gouging Democracy, a Report by the Alliance for Better Campaigns, p. 3, 2001. *available at*: http://bettercampaigns.org/reports/display.php?ReportID=4 (last viewed Jun. 1, 2004).
[76] "The Last Hurrah: Soft Money and Issue Advocacy in the 2002 Congressional Elections," Edited by David B. Magleby and J. Quin Monson. The Center for the Study of Elections and Democracy at Brigham Young University, January 2003. Data derived directly from CSED's dataset, *available at*: http://cid.byu.edu/magleby/docs/CSEDHurrah.pdf (last viewed Jun. 1, 2004).
[77] *Political Primer 1978* at 2216.

reasonable.[78] For example, a "licensee may not adopt a policy that flatly bans federal candidates from access to the types, lengths and classes of time which they sell to commercial advertisers."[79]

Consistent with these principles, a digital audio broadcaster must grant federal candidates reasonable access to all of its program services, including ancillary or supplemental services. For instance, the Commission cannot allow digital audio broadcasters to segregate candidate-centered programming to a lesser used program stream. Candidates "target specific voting groups" with broadcast advertisements.[80] A digital broadcaster who refuses to sell or give time to a candidate on its ancillary pay service or agrees to sell time to a candidate only on the licensee's less popular channels, impermissibly interferes with the candidate's rights of access. Such a practice is unreasonable and therefore unlawful under § 312(a)(7).[81]

The Commission should also require digital broadcasters to provide reasonable access to local and state candidates. The reasonable access requirement "does not exempt stations from making time available to candidates for non-Federal offices."[82] Licensees have a duty inherent in their obligation to serve the public interest to present *local* political issues.[83] The Commission itself has noted that the presentation of political broadcasting concerning local affairs is "vital to

---

[78] *See Commission Policy in Enforcing Section 312(a)(7) of the Communications Act Report and Order*, 68 FCC 2d 1079 (1978) ("*Report and Order on 312(a)(7)"*).
[79] *Id*. at 1094; *see also CBS v. FCC*, 453 U.S. 367, 382 (1981) (describing the Commission's "rule of reason" with respect to bans on candidate advertising). It is also impermissible for a licensee to refuse "to sell or give prime-time programming to legally qualified candidates." Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C. 2d 516, 516 (1974).
[80] *Becker*, 95 F.3d at 80 (citations omitted).
[81] *See id.* (citing *CBS*, 453 U.S. at 389).
[82] *Political Primer 1978* at 2286.
[83] *See Report and Order on 312(a)(7)*, 68 FCC Rcd at 1087-1088.

the proper functioning of our Republic."[84] While the obligation to serve the local community continues into the digital broadcasting era, the Commission should take further action to preserve local political discourse. Analog-only broadcasters have maintained that they could not practically provide access for all local candidates because it was difficult to accommodate a large number of candidates on a single channel and maintain any other programming. However, since DAB already allows broadcasters to transmit more than one channel of information, impracticability arguments must fail. With the extra capacity, digital audio broadcasters will now have the space to accommodate state and local candidates and the Commission should require them to do so.

At minimum, the Commission should extend its "rule of reason" prohibiting bans on sales to federal candidates to encompass state and local campaigns. As discussed above, broadcasters have a responsibility to inform their communities on issues of local political importance. For a broadcaster to ban all local candidates from advocating their candidacy on its airwaves is patently unreasonable and in violation of this duty.

C. Other Existing Statutory Rules Must Apply To Multicast, Subscription, And Other Services Made Possible By DAB

1. Station Identification Rules

In the *FNPRM*, the Commission requests comment on whether and how to apply station identification rules.[85] Station identification is important for listeners to identify which station they hear in the case of violations or information. Clearly understandable station identification rules that differentiate between multiple channels offered by the same licensee, and identify the owner and location of the owner of the station is necessary to allow the public to identify the

[84] *Licensee Responsibility as to Political Broadcasting*, 15 FCC 2d 94, 94 (1968).
[85] *FNPRM* at ¶¶ 39, 47.

source of the programming. The Commission should expand the call letters that a station uses to identify itself to allow listeners to easily remember which station and channel to which they are tuned. A licensee would simply notify the Commission that it is beginning a new audio or data channel, and how it will identify that channel. Upon license renewal, the licensee would also list the additional audio or data streams and how they are identified.

In addition to simply identifiable expanded call signs, the Commission should require identification of the owner corporation, the city of its headquarters, and the community of license. When call sign obligations were adopted, the owners were local. Today the owners are often national corporations that are geographically removed from the communities they serve. Thus, to accurately inform the public, station IDs should include identification such as "Clear Channel, San Antonio, Texas serving Washington DC."

2. Sponsorship Identification Rules

The Commission requests comment on how to apply the sponsorship identification rules to multicasting and subscription services.[86] Sponsorship identification rules require that when a broadcast station "transmits any matter for which money, service, or other valuable consideration" is paid, that station shall disclose the true sponsor or payor at the time the material is aired.[87] The Supreme Court has recently reinforced the need for disclosure requirements in political advertising.[88] The Court acknowledged important interests in disclosing the source of political advertisements: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more

[86] *FNPRM* ¶ 40.
[87] 47 C.F.R. § 73.1212(a).
[88] *McConnell*, 124 S.Ct. at 690-92.

substantive electioneering restrictions."[89] The Commission should clarify that it sponsorship identification regulations[90] apply to any and all newly-created digital broadcasting services, including for-payment transmissions, whether that transmission is on the primary audio channel, is multicast, or is provided via subscription services. As in other areas, the Commission should not use its *Subscription Video* decision to eliminate protection and information for the public.

3. Cigarette Advertising Rules

In the *FNPRM*, the Commission requests comment on whether and how to apply cigarette advertising rules to multicast and subscription services.[91] These rules should continue to be applied uniformly to every use of spectrum that a broadcaster chooses to implement. Congress mandated that it is "unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[92]

The Commission has previously determined that a closed circuit system incapable of receiving off-the-air transmissions is an electronic medium subject to both Commission jurisdiction and the cigarette advertising rules.[93] Multicasting and subscription are both part of the medium of digital radio, which uses the same spectrum, including the sidebands, currently used by analog radio. Digital radio is therefore a medium subject to FCC jurisdiction. Because the statute plainly applies the cigarette advertising rules to "any medium of electronic communication subject to the jurisdiction" of the FCC, the cigarette advertising ban applies to both multicasting and subscription offerings.

---

[89] *Id*. at 690.
[90] particularly those in 47 CFR § 73.1212.
[91] *FNPRM* at ¶ 40.
[92] 15 U.S.C. § 1335.
[93] *See Market Technologies Group Request for Declaratory Ruling on the Applicability of the Cigarette Advertising Prohibition in 15 U.S.C. § 1335*, 4 FCC Rcd 2694 (1989).

4. Payment Disclosure Rules

In the *FNPRM*, the Commission requests comment on whether and how to apply payment disclosure rules (plugola and payola) to multicast and subscription services.[94] The payment disclosure rules state that anyone "who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station."[95] The rules apply to broadcast of "any matter over such station." Multicasting and subscription services both use the station's facilities to air matters, so the payment disclosure rules must apply equally to primary audio, multicasting, and subscription services.

In addition to applying to all services that originate from a radio licensee's facilities, payment disclosure rules should be strengthened due to increasing evidence that loopholes in the rules are being abused. National playlists have squeezed out local bands and homogenized music across the country. Indeed, a study by the Future of Music Coalition demonstrates the national and local homogenization of music in commercial terrestrial radio.[96] According to the study, playlists among commonly owned radio stations contained significant overlap. Even within the same market, commonly owned stations having supposedly different formats had considerable overlap in their playlists. Nor did playlists vary significantly over time. The end-product of such homogeneity is a terrestrial broadcast service virtually indistinguishable from a national satellite service. The study showed that most supposed "increases" in format diversity are in fact duplicative services packaged with different labels, but containing the same content.

---

[94] *FNPRM* at ¶ 40.
[95] 47 U.S.C. § 508(a).
[96] Peter DiCola & Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians,* Future of Music Coalition (2002).

Worse, there exists credible evidence that variations in playlists come from more sinister sources than local taste. Persistent concerns about the revival of payola remain unaddressed. Even where there is not a direct *quid pro quo* of payment of money in exchange for airplay, the consolidation of the industry has allowed media conglomerates to extract "payola in kind," *i.e.* to receive significant airplay, a music group must purchase a package deal that includes concert promotion and billboard advertising. Recently, in denying a motion for summary judgment and allowing the antitrust case to go to trial, a district court in Colorado made very detailed findings of fact regarding Clear Channel's ability to control play lists nationally to force music groups to enter into such package deals.[97] In addition, independent record promoters have become the middlemen between the labels and stations.[98] The record labels hire independent labels, or "indies," to promote an artist, and the indies promise stations promotional payments.[99]

Deregulation and subsequent consolidation has resulted in more powerful independent record promoters, higher costs to record labels and artists, and the shutting out of smaller artists and labels.[100] The Coalition urges the Commission to study these abuses, the resulting impact on independent artists, and explore ways to strengthen the payment disclosure rules.

---

[97] *Nobody In Particular Presents, Inc. v.* Clear Channel Communications, Inc., 311 F. Supp.2d 1048 (D. Col. 2004). On June 2, 2004, Clear Channel and Nobody In Particular Presents entered into a settlement under which Clear Channel admitted no violations of law.
[98] *See* Eric Boehlert, *Pay for Play*, Salon, *available at*: http://archive.salon.com/ent/feature/2001/03/14/payola (Mar. 14, 2001). *See generally*, Gregory M. Prindle, *No Competition: How Radio Consolidation has Diminished Diversity and Sacrificed Localism*, 14 Fordham Intell. Prop. Media & Ent. L.J. 279 (2003).
[99] *See* Boehlert.
[100] *See id.*

D. The Transition Should Not Degrade the Quality of Freely-Available Radio Service.

1. Broadcasters Must Continue To Provide A Freely Available, High Quality Audio Channel.

The transition from analog to digital audio broadcasting will allow broadcasters to split their spectrum in order to provide more than one audio and data channel to the public.[101] Stations will have the choice to offer one audio stream that is of very high quality, or several streams that have lower quality. While the technology is being developed, it is important to note that DAB should increase the quantity and quality of available programming, not decrease that availability. Therefore, we ask the Commission to mandate that every licensee must provide at least one audio channel that is a free service. That channel must be of at least the highest quality offered by the licensee, but in no circumstances can a broadcaster sacrifice a signal of at least the quality of current analog FM or AM broadcasts so that it can offer services not freely available to the public.[102] Thus, for example, if a broadcaster wanted to sacrifice quality so that it could offer multiple streams of talk-radio or other audio programming at a lower quality level, it would be free to do so, but a broadcaster could not convert virtually all of its digital capacity to private subscription use, leaving only 12 kbps of free audio programming for the public.

[101] National Public Radio, *Tomorrow Radio Field Testing in the Washington, D.C., New York City, San Francisco, and Los Angeles (Long Beach) Radio Markets, ex parte*, MM Docket No. 99-325 (Mar. 10, 2004).

[102] The Coalition currently understands that there are 96 kpbs of available capacity in the standard digital transmission, and that 32 kbps offers something that is virtually equivalent to FM broadcast quality today.

2. Broadcasters May Not Dedicate Its Capacity In A Manner That Allows Excessive Commercialization.

The Commission must ensure that any broadcaster does not devote excessive time to material which consists of the transmission of advertising, sales presentations or program length commercials.

Since 1981, the Commission has erroneously ignored Congressional intent to prevent excessive commercialization in the broadcast industry. The Commission hypothesized that market forces would be adequate to keep over-commercialization at bay.[103] In 1983, the courts allowed the Commission's elimination of commercialization restrictions in deference to an agency's policy judgments and predictions of future industry behavior.[104] However, the court also clarified that "[t]he Commission may well find that market forces alone will not sufficiently limit over-commercialization. In that event, we trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding."[105]

Market forces alone have not sufficiently limited over-commercialization. The deregulatory impact of the Telecommunications Act of 1996 resulted in increased commercialization. Between 1995 and 1998, national spot advertising on radio stations increased by a 13 percent compound annual rate and local spot advertising increased at a 9.3 percent compound annual rate.[106] An FCC commissioned study also found that increased consolidation leads to a decrease in the total amount of non-advertising broadcasting.[107]

---

[103] *Deregulation of Radio*, 84 FCC 2d 968 ¶82 (1981).
[104] *United Church of Christ v. FCC*, 707 F.2d 1413, 1438 (D.C. Cir. 1983).
[105] *Id*.
[106] John Suhler, *Radio Reaps Deregulation Benefits; Acquisitions Boost Revenues*, Broadcast Cable Financial Management Association, *available at*: http://www.bcfm.com/financial_manager/Radio%20Report.htm (last visited Jun. 15, 2004).
[107] Brendan Cunningham and Peter Alexander, *A Theory of Broadcast Media Concentration and Commercial Advertising*, Media Ownership Working Group Study 6 (2002).

Informal studies also show that radio is overly commercialized. For example, an informal study found that Infinity Broadcasting's WCKG-FM in Chicago recently ran a single unit of commercials that lasted over 18 minutes and included 36 different advertisements.[108]

Market forces in the radio industry are not preventing over-commercialization and the Commission should implement safeguards against the spill of over-commercialization into new digital offerings. At minimum, the Commission should adopt prohibitions against excessive commercialization of leased capacity.

3. Non-Commercial Licensees Should Offer One Non-Commercial Main Channel And Should Not Be Allowed To Offer Advertising On Any Program Offering.

The Commission seeks comment on whether it should adopt the digital television model for noncommercial digital audio broadcasting.[109] The Coalition supports the Commission's decision in digital television to require noncommercial broadcasters to offer one non-commercial free over-the-air broadcast service, like all digital television broadcasters.[110] As the Coalition explains above, however, some minimum obligation should be placed on digital broadcasters so that the free over-the-air service is available via the highest quality channel that a broadcaster offers to the public. Similar to the digital television obligation, the Coalition believes that digital radio broadcasters should be obligated to "use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service," meaning a "substantial majority" of

[108] Kurt Hanson, *Infinity Running 35 Unit Stopsets on Howard Stern's Program, Radio and Internet Newsletter*, *available at*: http://www.kurthanson.com/HTM-RAIN/NewsArchives/1000/100300.htm (last visited Jun. 15, 2004).
[109] *FNPRM* at ¶¶61-62.
[110] *Digital Television Fifth Report and Order*, 12 FCC Rcd at 12820-23.

the entire digital capacity.[111]

The Coalition strongly disagrees with the policy choice made by the Commission with respect to advertising on noncommercial digital television capacity. The Commission concluded for digital television that the ban on advertising on noncommercial television contained in Section 399B of the Communications Act does not apply to substantial portions of their programming. Specifically, the Commission exempted all "ancillary or supplementary services" which include any subscription service, data transmission service, or capacity leased out to other entities.[112] The Commission did conclude that any service offered free, over-the-air must be devoid of advertising.[113]

The Commission should not repeat its error in digital radio by allowing advertising by noncommercial digital licensees.[114] Noncommercial broadcasters will have many opportunities, consistent with present rules, or with some minor modification, to earn revenue from the additional capacity. But turning noncommercial stations into commercial stations, even in part, is violating the original intent of setting aside spectrum for noncommercial use. Each time noncommercial licensees transform a part of their program service into a commercial, advertiser-

---

[111] *Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licenses*, 16 FCC Rcd 19042, 19048 (2001).

[112] Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licenses, 16 FCC Rcd at 19052. The Commission relied in part on its decision in the Subscription Video proceeding, which concluded that the term "broadcasting" "refers only to those signals which the sender intends to be received by the indeterminate public," and thus excludes any programming that can be received only with "special arrangements or equipment." *Id*. at 19053 (citing *Subscription Video*, 2 FCC Rcd 1001, 1004 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[113] *Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licenses,* 16 FCC Rcd. at 19054 ("over-the-air video programming provided at no charge to viewers is not ancillary or supplementary service, and, conversely, that services other than a free video broadcast signal are, by definition, ancillary or supplementary services.")

[114] The Coalition recognizes that the Commission's freedom to allow the commercialization of the noncommercial band was upheld in court, *UCC v. FCC*, 327 F.2d 1222 (D.C. Cir. 2003), but this does not mean that the Commission must repeat the error.

supported service, the small ratio of noncommercial to commercial programming gets even smaller. Even as the Commission allowed noncommercial radio to become more commercial, it conceded there was a danger that "allowing NCE licensees to provide advertiser-supported services will denigrate the noncommercial nature of the public television system."[115] Overcommercialization is likely only to reduce the inclination for the public to donate funds to support public broadcasting, as the public perceives no difference between commercial and non-commercial services. The Commission acknowledged the danger in its digital television decision, and committed to carefully monitoring the situation.[116]

A significant difference also separates digital television and digital radio. In digital radio, at least at this time, there will likely only be two, or maybe three, program streams available to the public. In digital television, the projection is for five program streams, and this number is growing. If noncommercial digital radio broadcasters were allowed to make its second audio channel into a commercial service, it would be taking one of two channels into the commercial realm. Even if the relative capacity dedicated to free programming is greater, it is highly likely the public would perceive this as a 50% dedication of noncommercial spectrum to commercial purposes, further eroding support for noncommercial broadcasters. The Commission should not extend its error in digital television to digital radio.

---

[115] *Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licenses*, 16 FCC Rcd at 19055.

[116] "NCE licensees are ... constrained by such limitations as the nonprofit educational mission upon which their tax exempt status is based, the need to preserve viewer and government support, the requirement to pay taxes on income unrelated to the exempt purpose of the organization, and the oversight of stations by responsible bodies. If we find that these requirements are not sufficient to ensure the integrity of the noncommercial educational broadcast service, we will revisit our decision to allow NCE licensees to provide advertiser-supported ancillary or supplementary services." *Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licenses*, 16 FCC Rcd at 19055-56.

E. Disclosure

Public interest requirements should be complemented by an effective monitoring system. Public disclosure is an essential element in ensuring that broadcasters meet their minimum public interest obligations. Broadcasters should be required to identify and describe their local public interest programming, when it was aired, and how the programming fulfills their responsibility to meet the local informational and educational needs of their communities.

Substantive disclosure requirements promote public awareness of a broadcaster's compliance, or noncompliance, with its requisite duty to serve the community. To this end, we propose that the FCC require broadcasters to file detailed periodic reports documenting their compliance with their minimum public interest obligations.[23]

Public disclosure is essential to the relationship between broadcasters and their communities, and the FCC should update current regulations to reflect digital technology's potential to improve these relations. Broadcasters should be required to electronically file periodic reports on the licensee's web site and inform the public how they can be obtained over the air during the station's most popular listening times.

The current rules allowing licensees to maintain public inspection files on computers and encouraging them to post them on their web sites are insufficient. It is relatively simple and inexpensive for the FCC to require a digital licensee to post these files on their web sites, if they have web sites.[24] This simple procedure would make the public inspection files more easily

[23] Current regulations, including maintaining quarterly issues and program lists in a public file, do not adequately describe programming, nor the quantity provided, nor how that programming is meeting public interest obligations. *See* 47 C.F.R. § 73.3526(e)(11)(i). As a result of the current rules, a community cannot sufficiently hold broadcasters accountable for satisfying their public interest obligations to their communities, the very reason for receiving the broadcast license in the first place.

[24] Broadcasters are already required to post their public EEO file on their websites. *EEO Order* at ¶ 124. The Coalition would support an exemption for stations that are so small they do not

accessible. The Commission should also develop a searchable database of these filings on its web site. In addition, the Commission should require broadcasters to regularly broadcast on-air notifications where reports can be viewed and obtained. Increasing the public's access to this information will increase the likelihood that the information is used and make the time spent on these obligations more efficacious.

The Coalition suggests that quarterly filing, Internet posting and on-air notification requirements be incorporated into the broadcaster's license renewal. Strong public disclosure regulations will better enable the public to determine if broadcasters are meeting their obligations to serve their communities, as well as encourage licensees to follow these rules.

V. BROADCASTERS THAT CHOOSE TO OFFER SUBSCRIPTION AND OTHER NON-ADVERTISER SUPPORTED SERVICES MUST FULFILL ADDITIONAL PUBLIC INTEREST REQUIREMENTS FROM A FLEXIBLE MENU.

The Coalition strongly endorses the Commission's tentative conclusion that it should adopt policies that encourage more audio streams to enhance program diversity.[117] This added capacity could be one of the only opportunities to add service for underserved audiences over a mass medium. The Commission has the legal obligation to promote service to all parts of the country and to all Americans.[118] Offering the public an opportunity to receive information from a wider diversity of voices furthers the fundamental First Amendment interest in promoting the "widest dissemination of information from diverse and antagonistic sources."[119]

---

currently maintain web sites, particularly if the Commission were to make access via its web site possible.

[117] *See FNPRM* at ¶ 20.

[118] 47 U.S.C. § 151.

[119] *See Associated Press v. United States*, 325 U.S. 1, 20 (1945).

As the Commission explains, DAB provides new flexibility, and permits multicasting to some degree at the present time.[120] Digital broadcasters may broadcast a single so-called "high definition" channel, or they can divide their bitstream into several different channels. Given the evolution of digital technology in all areas of media, it is likely that DAB's capacity to transmit information will improve dramatically as technological advances are made. The Coalition premises much of its proposal below on the anticipated additional capacity that digital radio will bring. While present estimates include up to three channels of digital audio programming, the Coalition notes that digital television has undergone a significant expansion in its potential capacity since its inception, as has satellite television programming. The Coalition foresees similar technological innovation, particularly if the Commission adopts the Coalition's proposal to push the development of new technology in the public interest.

As described above, minimum public interest requirements should apply to all digital audio broadcasters, regardless of how they use the spectrum. In light of DAB's new capabilities, however, the Commission should also adopt additional public interest obligations commensurate with how a broadcaster decides to use the digital spectrum. In order to promote the utilization of newfound digital capacity, not restrict commercial development, but also ensure a return to the public, public interest commenters suggest the Commission develop a menu of options for broadcasters that wish to offer more revenue-enhancing services so that they may earn their right to do so through additional public interest obligations.

Promoting diverse sources of information for the public is increasingly important in this era of unprecedented media market consolidation. This change is an opportunity to ameliorate, at least partially, this wave of concentration by increasing the ownership and source diversity on

[120] *FNPRM* at ¶ 18.

the airwaves, the availability of noncommercial programming, and the access by underrepresented groups to distribution mechanisms. An obligation to offer independent and noncommercial programming would be consistent with the obligations of other multichannel providers that must reserve capacity for particular programming.[121] It is important to note that if each present-day broadcaster eventually receives the capacity to triple its capacity to offer programming, then the present market will become more consolidated as the relative number of independent programming decreases in relation to the amount of programming produced by consolidated sources.

Public interest commenters support a flexible policy that will allow maximum tailoring by broadcasters as long as the arrangement promotes the public interest by offering access to underrepresented and unaffiliated voices.

A. The Menu Concept

The broad concept here is to develop an incentive structure that builds upon the natural market-based incentives for broadcasters and links those interests to obligations that benefit the public. The public interest obligations should be flexible, and allow broadcasters to put together a total public interest package that best suits their needs and capabilities and their local

[121] For example, cable operators are required to make available between ten and fifteen percent of their channels for lease to unaffiliated programmers. *See* 47 U.S.C. § 532(b)(1); 47 U.S.C. § 532(a) (adopting purpose "to assure that the widest possible diversity of information sources are made available to the public.") In addition, cable operators are required, at the request of the local franchising authority, to provide channels for public, educational and governmental access. *See* 47 U.S.C. § 531. DBS broadcasters are also required to set aside four percent of their capacity for NCE programming. *See* 47 U.S.C. § 335; Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 13 FCC Rcd 23254, 23285 (1998). The rationale behind these requirements stems from Congress' belief that ensuring public access to all forms of electronic media is an important governmental goal. *See Time Warner v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996). The same rationale for leasing space for public use on cable and DBS applies to radio digital broadcasters with the ability to multicast.

communities. At the same time, general obligations without teeth have not been successful. These quickly degrade into the "bare minimum" of service for the community.

While the commercial system offers many benefits to the public, there are other benefits that cannot be served in a totally market based system. Public broadcasting cannot meet all of the needs in our increasingly diverse communities, and public broadcasters are not best suited to serve all of those needs. Commercial broadcasters must also step up to the plate.

The Coalition suggests a menu format that assigns relative weights to public interest obligations, and also assigns relative weights to new non-advertiser based services that a broadcaster may wish to offer. The weights would be assigned in the form of points, which would reflect the Commission's priorities for different public interest needs and the value of certain services to the community. Therefore, for example, a second audio stream comprised of a free, over the air service that serves a previously unserved community would be strongly encouraged through relative point allocations (such a service would probably not require a broadcaster to earn any additional points because it is itself a public service). On the other hand, a proposal to offer a subscription service or to lease out time to another broadcaster in the same market would require a larger number of points because that spectrum is essentially being removed from the public sphere.[122]

If done well, this menu driven point system would allow for maximum flexibility, maximum responsiveness, and would offer a market-style incentive structure that places value on certain activities--not in terms of revenue--but in terms of their value to the public interest. The Coalition has developed a more detailed proposal as laid out below. This proposal is one

[122] In the proposal in these comments, for simplicity, the Coalition suggests a single point obligation of 40 points for all new non-advertiser supported services. Better weighting of new services should be developed in this docket.

implementation of the menu approach, and includes this Coalition's evaluation of the relative values of various activities. But the Commission could well modify these based on the record in this proceeding. The Commission could adopt this approach for parts of the public interest obligations and not others. It is a flexible tool.[123]

This system retains the same benefits of the point system the Commission recently adopted for evaluating competing noncommercial license applicants.[124] The FCC selected a point system over other methods because it provided a balance of objectivity, substantive review, efficiency, low costs and predictability.[125] The FCC determined that selecting NCE applicants based on a point system "eliminate[d] the vagueness and unpredictability of the [prior] system."[126] A point system also "clearly express[ed] the public interest factors that the Commission [found] important in NCE broadcasters" and selected the applicant who best exemplified the Commission's public interest criteria.[127]

B. Coalition Proposal

The Coalition describes a relatively simple menu here. This proposal can provide the starting point for discussion. In this simplified version, all new services are of equal value, and broadcasters that choose to offer any subscription or other revenue-enhancing service must

[123] We note that this tool would be even better if combined with a pay or play model where broadcasters could contribute funds in lieu of in-kind activity, and these funds could be used to subsidize in-kind activity. The Coalition encourages the Commission to see authority to adopt this approach if it determines this is not possible under present law.
[124] Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order, 15 FCC Rcd 7386 (2000) ("NCE Order").
[125] *NCE Order*, 15 FCC Rcd at 7394.
[126] *Id*.
[127] *Id.*

satisfy 40 public interest points in order to earn the right to offer these services.[128] On the public interest side, we propose three tiers of menu options, each assigned a different number of public interest points. The options can be combined in a variety of ways to reach the 40 point minimum. Digital audio broadcasters can satisfy their additional public interest obligations by selecting between several flexible options on a menu. [129]

The proposed menu seeks to encourage the offering of new program streams that are not already offered in a market.[130] The Coalition believes that multicasting must be encouraged. The Coalition supports the offering of a second audio stream in as many contexts as possible. Providing additional programming content to the public is a significant benefit of developing digital audio broadcasting technology. When a secondary audio channel is used to provide a format that is not available in the market, provide programming for underserved communities, provide additional news or public affairs programming, or any other innovative and experimental programming, the community will clearly benefit. However, if a licensee chooses to use secondary audio channels to provide an duplicative format, subscription service, or other revenue-enhancing services, the broadcaster ought to then incur public interest obligations beyond the minimum requirements described above.

---

[128] In a more developed version, new services would be assigned a weighted point value and each public interest menu option would be assigned a point value. A broadcaster's utilization of new flexibility in licensing would be tied to its commitment to new public service obligations.

[129] As a public policy matter, public interest commenters would support an option where radio broadcasters could pay a fee in lieu of the activity listed on the menu, if the fees were put into a fund to support programming access by the same groups who have direct access rights under the proposed rule (possibly as a subsidy to cover costs for broadcasters who do offer access). Although such a fee would be voluntary and not mandatory, the Commission has expressed doubt about its ability to impose fees of any kind on broadcasters. Public interest commenters believe a "pay or play" model in this instance would be more flexible and more effective and suggest the Commission seek statutory authority for this option.

[130] The FNPRM asks how public interest obligations apply to a digital broadcaster who chooses to multicast. *See FNPRM* at ¶¶ 20-21.

Each item on the menu is described in detail below. Figure One shows the menu items and their assigned point values.

Figure One.

Offer programming stream on second channel from an independent noncommercial entity	40 pts.
Offer commercial programming on second channel to underserved audiences through a SDB.	40 pts.
Offer 5 minutes of broadcaster-produced public interest programming during drive time primary channel.	2 pts
Offer 5 minutes of broadcaster-produced public interest programming out of drive time on primary channel.	1 pt.
Offer broadcaster-created second channel to serve an underserved audience.	30 pts.
Create an outreach community board to communicate and receive input from the community.	20 pts.
Offer 10 minutes of program associated data during drive time.	2 pts.
Offer 10 minutes of program associated public interest data out of drive time.	1 pt.
Offer 5% of digital capacity to public interest datacasting.	15 pts.

1. Menu Tier One: Broadcasters May Dedicate A Second Channel For an Independently-Produced Programming Stream.

Under this option, a broadcaster would receive 40 public interest points for granting access to a complete secondary channel to a non-affiliated noncommercial programmer. The commercial broadcaster could obtain the full 40 public interest points if it offered, for free, a audio channel to a cable access programmer, to rebroadcast an LPFM station, or to allow a noncommercial programmer (including groups that qualify for an LPFM license but cannot obtain one because of spectrum scarcity or another NCE broadcaster) the opportunity to meet an underserved audience in the community. It could also receive 40 points if it signs a commercial contract with an independent "Small Disadvantaged Businesses" to offer programming.

In order to determine who is eligible for the broadcaster to meet its obligation, the Commission should adopt straight-forward and objective criteria that can easily be attested to in a simple filing before the Commission. These criteria must ensure that the independent broadcaster is truly independent. The Commission should apply criteria it utilizes in its attribution rules to ensure independence of programmers under this section. While the Commission would have the authority to review and reject any agreement if it finds the agreement does not comport with the Commission's rules, the certified agreements would be presumed approved 30 days after submission to the Commission unless the Commission takes action to prevent its implementation.[131]

a. Noncommercial Programming—LPFM, Cable Access Center, NCE programmers.

Rebroadcasting a LPFM stream would offer significant benefits. Low power radio stations that are on the air may eventually convert to digital broadcasting, and the Coalition supports their right to do so. In the early stages of the transition, however, this is likely to be a difficult proposition for several reasons. First, because LPFM stations operate at such low power, it is not known whether a digital side-band signal at 1/100th of its operating power will function appropriately. Second, the cost of transition, which may be within the ability of many stations, may be out of the reach of less well funded LPFM stations because of their very small budgets. Third, many of the populations served by LPFM stations may not be among the early adopters of digital technology. Nevertheless, some LPFM stations may be ideal candidates for transmission on a second audio stream. For example, presently some language minorities use

[131] The most efficient and transparent method would be to provide for electronic filing of these agreements, public access to them, and notification in the Daily Digest or other means to notify the public when they are filed. Because at least one party to the agreement will be a broadcaster converting to digital operation, the need for non-electronic filing should be virtually non-exisitant.

specialized SCA receivers to transmit information, thus purchasing a new piece of equipment may be easily adaptable for those populations. Secondly, a second audio signal will reach much farther than a LPFM signal, and an expanded reach could be particularly useful, particularly in more remote areas.

In the alternative, a broadcaster could offer a stream to noncommercial entities that meet the qualifications for a LPFM licensee, but are unable to become a licensee either because there is no spectrum available or because no window has opened to allow an application. In order to maximize the public benefit in granting these entities access to the digital spectrum, public interest commenters feel strongly that the Commission should limit access to entities that would qualify for all three points in the LPFM point system. This would mean that entities receiving access would commit to 8 hours of local programming a day, 12 hours of programming per day, and would have been in existence for 2 years prior to the contract being signed.[132] These are appropriate criteria because secondary channels are a scarce resource and the Commission will be allowing digital incumbent broadcasters flexibility within these criteria to select lessees. A heightened obligation to serve localism and provide a meaningful level of service is appropriate.

Community access centers have significant experience offering the public an opportunity to reach their fellow citizens. These existing centers currently help citizens learn how to produce

[132] *See* 47 C.F.R. § 73.872. The Commission's rules award points for:
(1) Established community presence. An applicant must, for a period of at least two years prior to application, have been physically headquartered, have had a campus, or have had seventy-five percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna. Applicants claiming a point for this criterion must submit the documentation set forth in the application form at the time of filing their applications.
(2) Proposed operating hours. The applicant must pledge to operate at least 12 hours per day.
(3) Local program origination. The applicant must pledge to originate locally at least eight hours of programming per day. For purposes of this criterion, local origination is the production of programming, by the licensee, within ten miles of the coordinates of the proposed transmitting antenna.

video programming over cable access channels. The centers that are responsible for offering the public access to cable television public access set-asides, known as "public educational, or governmental access facilities" are an ideal conduit for offering access to the airwaves for additional noncommercial speech.[133] Community access centers have significant experience offering the public an opportunity to reach their fellow citizens. These existing centers currently help citizens learn how to produce video programming over cable access channels. Building on the expertise of these centers would give a wider number of individuals access to the airwaves. As various media converge, these access centers have been taking on a wider array of communications mechanisms, including digital media.

b. Commercial Programming for Underserved Audiences Through Leasing to Small Disadvantaged Businesses.

Small disadvantaged businesses (SDBs) are a federally recognized category of business deserving specialized treatment.[134] This category of qualifying entity addresses the Commission's concern with the barriers to entry endemic to the broadcasting industry. Allowing broadcasters to lease a channel or portions of channels at reduced rates would be a good step toward alleviating the market entry and acquisition barriers that small, minority- and women-owned businesses face.[135] SDBs might offer a wide array of services, not limited to audio

[133] See 47 U.S.C. § 602(16).

[134] The term SDB and the government program supporting it, is defined and discussed at *Small Disadvantaged Business- What We Do, available at*: http://www.sba.gov/sdb/section06c.htm> (last visited Mar. 20, 2000).

[135] This mechanism would be one way the Commission could partially fulfill its obligation under Section 257 of the Telecommunications Act of 1996, 47 U.S.C. § 257, which directs the FCC to identify and eliminate market entry barriers for small telecommunications businesses, and build on the studies the Commission performed in pursuit of that obligation. *See* Public Notice, DA 04-1690 (Mass Media Bureau, Jun. 15, 2004).

services. In the case of an agreement with an SDB, the broadcaster might agree to offer 15% of data transmission capacity 24 hours a day, rather than a separate audio channel.

c. Required Aspects of Agreements with Independent Programmers.

To ensure the independence of broadcasters that are offered capacity via the menu, the Commission must adopt several safeguards which will be mandatory contract provisions between a digital broadcaster and the independent programmer. The Commission should adopt the following obligations:

- Each contract must be for no less than 6 months in duration.
- Providers must offer broadcasting space at reasonable prices, terms, and conditions, based on the circumstances present in each particular case. Providers and broadcasters both have discretion to determine what is "reasonable."
- Providers may not exercise editorial control over the programming offered,[136] except to the extent that such control is necessary to fulfill the obligations of Title III of the Communications Act.[137]
- Contracts may require the same technical quality standards to programming on the set-aside as it imposes on its own programming.
- Joint ventures between noncommercial educational programming suppliers and commercial will be allowed so long as the participants demonstrate that the joint venture is noncommercial.
- The contents of the contracts and information regarding broadcaster's compliance with these rules will be available in a public file.

Finally, any entity that obtains capacity who also has broadcast licenses will be treated as though they have obtained an additional ownership interest under the commission's ownership

[136] Under these circumstances, a broadcaster could not be held liable for content offered over the unaffiliated channel. See *Farmers Union*, 360 U.S. at 531; *see also Lamb v. Sutton*, 274 F.2d 706 (6th Cir. 1960) (applying *Farmers Union*) (holding that when a broadcaster is denied editorial control over a broadcast, broadcasters can not be held liable for defamatory statements contained in those broadcasts).

[137] These principles are generally based upon principles that apply to the DBS noncommercial set-aside. See generally, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, 13 FCC Rcd. 23,254 (1998).

rules. Attribution rules will likely have to be modified to appropriately take into account these arrangements.

2. Menu Tier Two: Broadcasters May Offer Their Own Public Interest Programming Beyond the Core Obligations

a. Additional Programming on the Main Channel.

Under this option, broadcasters could choose to air programs that serve the public interest on an hourly basis rather than dedicate an entire channel. Broadcasters would receive points depending on the time of day the programming is broadcast, and would receive no points for programming between midnight and 6 am. Broadcasters would receive two points for every 5 minutes they offer during drive time and one point for every 5 minutes they offer during other broadcast hours.[138]

The type of programming that would qualify could be defined broadly to include broadcaster-produced local community news, discussions of local public affairs, programming related to local political campaigns or ballot issues, programming for underserved communities, programming for non-English speaking communities, educational or informational programming, and children's programming.[28] This programming could not be fulfilled using non-controversial public service announcements for more than 10% of the time allocated. Broadcasters selecting this option could also select to host debates between local candidates.

[138] Drive time is from 6 am to 10 am and 4 pm to 7 pm Monday through Friday.

[28] Although all such programming need not be noncommercial, the Commission should take steps to encourage the provision of noncommercial programming.

News programming would only receive credit if it is created in-house, obtaining news from a centralized source would not qualify.[139]

The option of providing additional public interest programming is quite flexible. It permits a broadcaster to determine the needs of its community and what type of programming would best serve its listeners. For example, a broadcaster could provide an amalgam of local, children's educational, and political programming. Broadcasters would be free to choose the types of programs and what subjects and viewpoints would be presented. This option also recognizes the different conditions in different local markets.

b. Broadcaster-Produced Programming Serving an Underserved Audience on a Secondary Channel.

A broadcaster would receive 30 points for each channel that it creates itself to serve an underserved audience. For example, a broadcaster selecting this option could decide to offer a channel of non-English programming that caters to a local immigrant population. The broadcaster could also have the flexibility to provide a format not already available in the market. For example, if a market does not have a station that offers classical music, a broadcaster could choose to serve that need. Or, if the market provides no significant radio time to local artists, a broadcaster could choose to dedicate the second channel to serving those needs.

This menu option also gives broadcasters the option to tailor the secondary channel to provide a variety of public interest programming or programming tailored for underserved communities. The type of programming that would qualify could be defined to include news, discussions of public affairs, programming related to political campaigns or ballot issues, locally

[139] Andrew Jay Schwartzman, *Viacom-CBS Merger: Media Competition and Consolidation in the New Millennium*, 52 Fed. Comm. L.J. 513, 516 (2000) (describing services that offer a complete turnkey news operation to multiple stations in multiple markets, far exceeding current ownership rules).

oriented or originated programming, educational or informational programming, and children's educational programming.[140]

3. Menu Tier Three: Broadcasters Can Choose To Provide Public Interest Services Via Non-Audio Programming.

a. Datacasting

The ability of digital broadcasters to datacast information creates enormous potential for broadcasters to better serve the public interest by datastreams to community needs.[141] These dedicated datastreams would receive points based on the capacity or on the hours and time of day dedicated to the service. Because these services are in the infancy, it is somewhat difficult to predict the contours of the service. For data associated with audio programming, the Coalition proposes that broadcasters receive 2 points for every ten minutes of data dedicated to public interest data transmission during drive time, and 1 point for every 10 minutes outside of drive time. For other data services, the Coalition proposes that broadcasters receive 15 points for each 5% of digital capacity dedicated to datacasting.

Broadcasters will soon be able to transmit data regarding weather, public safety and health, governmental activities, and educational programming, to name a few.[142] Because of this vast potential to serve the public interest, we ask that broadcasters begin to work with local educational and public safety institutions to develop community datacasting services.

---

[140] *See supra* Part IV for a discussion of the definitions of local civic and locally-originated programming.

[141] *FNPRM* at ¶ 27. Because the technology is still developing, it is difficult to determine when this option will be available to broadcasters, but we propose it as a future consideration because will soon be able to provide much more sophisticated data delivery than is available now.

[142] *See An Advanced Application Services Framework for Application and Service Developers Using HD Radio Technology*, iBiquity White Paper, *available at*: http://www.ibiquity.com/technology/documents/SY_TN_5032_000.pdf (last visited Jun. 15, 2004).

Broadcasters selecting this option could provide on-demand services including weather, traffic, local public transportation delays, and local news. Broadcasters could develop datastreams that are 100 percent dedicated to emergency coverage[143] including local and national emergency announcements, announcements of unavailable disabled services, Homeland Security alerts and instructions, and amber alerts. Other datastreams could be 100 percent dedicated to civic, political, basic voter education, and election information including polling locations and results. Still other datastreams could be dedicated to community information like community activities calendars, the location of community service organizations, information about local schools' concerts and sports events, and information about afterschool programs offered by school, libraries, and other local organizations, and other programs for underserved communities.

b. Ascertainment.

Another non-audio option for broadcasters would be the implementation of policies that ascertain the needs of the local community. Broadcasters would receive 20 points for creating a community outreach board that invites members of the public to present their opinions on how the station is serving the community at monthly meetings.

VI. OTHER RULES

A. Consumers Must Be Protected by Opt-In Privacy Policies.

While digital audio broadcasting provides the opportunity for new and innovative programming, the interactive potential of DAB raises serious questions concerning consumer privacy. To protect consumer privacy, the Commission should adopt a rule that prevents digital audio broadcasters from collecting personal information unless the consumer "opts-in" to the scheme after adequate notice.

[143] *FNPRM* at ¶¶ 37-38.

The future possible uses of digital audio radio include more than simply services listeners and subscribers will receive passively over the air. These services include "mobile commerce options" and other services that will require the exchange of information between broadcast listeners and users and merchants or other vendors.[144] The Coalition understand that these services may include a user account that will enable individuals to purchase content or other products through their radios.

These all could be extremely useful, convenient, and popular applications. But citizens are often asked to give up privacy as a condition of receiving a useful service. The importance of being left alone and keeping information private has long been implemented in communications policy, from the recent wildly successful do not call list, to age-old FCC protections for Customer Proprietary Network Information (CPNI), [145] to recent protections adopted by Congress for wireless location privacy.[146] Some of services envisioned for digital radio echo similar services offered by cellular telephone providers, and which gave rise to Congressional adoption of strict privacy protection. Like these services, digital radio has the potential to not only disclose personal information, but a listener's location as well. While privacy has not been a significant concern for broadcasting in the past, users of digital radio technology should receive the highest privacy protection. Users should not be put in a position of accidentally revealing information because default policies allow for information disclosure rather than requiring consumers to take affirmative steps to disclose information.

---

[144] *See* http://www.ibiquity.com/hdradio/hdradio_21stcentury.htm (last visited Jun. 7, 2004).
[145] *See* 47 C.F.R. § 64.2007 (requiring customer approval for the release of CPNI), 64.2008 (requiring carriers to provide notice to customers of potential use of CPNI), 64.2009 (requiring carriers to implement procedures for obtaining consent, sufficiently training employees to obtain customers' consent, and maintaining records of their use of CPNI).
[146] *See* 47 U.S.C. § 222 (f) (deeming wireless location information protected customer proprietary network information).

DAB can allow broadcasters to gather significant amounts of personal information about people, including listening and purchasing habits, and use that information to target advertisements to the consumer. Future interactivity will allow broadcasters to individually target advertisements. According to some analysts, the combination of collecting information and using it to target ads to audience members "may prove to be the biggest money spinner of all-targeted advertising."[147] The efficiency of such a targeting system is revolutionary for the advertising and mass media industries. From the consumer's perspective, however, this ability to collect and utilize personal information is frightening. The public has already expressed grave concerns about the collection of personal information on the Internet.[148] These same concerns apply with greater force to digital broadcasting, including digital audio broadcasting.

In light of the amount of money at stake,[149] and the dangers to consumer privacy, it is imperative that the Commission act before the market fails to protect the privacy interests of consumers. The Commission should adopt rules to prevent broadcasters from using the interactive capabilities of DAB to violate consumer privacy.

The Coalition therefore urges the Commission to adopt a DAB privacy policy that tracks the privacy protections cable operators must afford to subscribers and protects location privacy similar to the manner it is protected by law.[150] Cable operators must provide all subscribers with clear notice describing what personally identifiable information might be collected, how it may

---

[147] *Id.* For example, "when the World Cup finals finishes imagine the potential of an on screen advert selling the official ball of the tournament . . . [i]t could be bought at the touch of a button." Martin Sims, *From Aiming too High to Aiming Too Low*, INTERMEDIA at 5 (June 1999).
[148] *See* Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware,"* 47 A.F. L. REV. 125 (1999).
[149] *Cf.* Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 770, 775 (1999) ("[b]y 1998, the gross annual revenue of companies selling personal information and profiles, largely without the knowledge or consent of individuals concerned, was reportedly $1.5 billion").
[150] *See* 47 U.S.C. §§ 551, 222.

be disclosed, how long the operator retains the information, and where the subscriber may have access to such information if collected.[151] A cable operator is prohibited from collecting personally identifiable data without the subscriber's prior consent.[152] Lastly, a subscriber has a right to access the data collected by the cable operator as well as the right to correct any erroneous information.[153] In a similar manner, the law affords wireless customers similar privacy with respect to their location.[154] Wireless service providers must protect the location of their wireless customers as confidential.[155] Wireless service providers may only disclose information about a caller's location to immediate family members or legal guardians in an emergency situation to prevent risk of death or serious bodily harm, or to emergency personnel or database management services when such disclosure is in the interest of public safety.[156] For *all* other disclosures, however, wireless carriers must obtain prior customer consent in order to disclose customer location.

Each of these frameworks provides excellent guidance to the Commission in this new application of a very similar technology. There is no reason why consumers should have less privacy protection on digital radio than on cable. The Commission should adopt similar rules to prevent digital audio broadcasters from collecting consumers' viewing and purchasing habits without consumer consent. Consumer consent should only be valid after the digital broadcaster has given clear and understandable notice of what information is being collected and how it will be used. Similar to the cable protections, the Commission should pass regulations that give consumers the right to access data collected by the digital audio broadcaster and the right to

[151] 47 U.S.C. §§ 551(a)(1)(A)-(D).
[152] 47 U.S.C. §§ 551(b)(1).
[153] 47 U.S.C. §§ 551(d).
[154] *See* 47 U.S.C. § 222 (f).
[155] *Id.*
[156] 47 U.S.C. §§ 222(d)(4)(A)-(C).

correct any erroneous information. The above four requirements - notice, consent, access, enforcement, and correction - are not only consistent with the privacy protection enjoyed by cable subscribers, but are consonant with general privacy principles applicable to all forms of consumer data collection.[157]

Moreover, a meaningful consumer interactive privacy regulation is good policy for business, as well as consumers. Consumers wary of compromising their privacy rights every time they turn on the radio may simply turn their attention elsewhere. Protecting consumer privacy is good for the market because it increases consumer confidence.[158] The Commission also has the authority to adopt consumer privacy safeguards under its traditional statutory duty to ensure that broadcasters fulfill their roles as public trustees and act in the public interest. Indeed, § 336(b)(5) explicitly grants the Commission the authority to "prescribe *such other regulations* as may be necessary for the protection of the public interest, convenience and necessity."[159] It is beyond reproach that consumers have a right to protect personal information. Digital audio broadcasters licensed to serve the "public interest, convenience and necessity" must abide by that right and the Commission should enforce it.

B. Data collection.

In addition, we ask that the FCC undertake to review the DAB rules periodically until it determines that the transition to digital audio broadcasting is substantially complete, and utilize these policy principles as guideposts for those periodic reviews.[160] The periodic reviews should

---

[157] *See* Pippin at 128-29 (discussing general consumer privacy principles in the context of data collection over the Internet). *See also* 47 U.S.C. § 222 (privacy requirements for telecommunications carriers).
[158] *See* Reidenberg at 772 (discussing how fair privacy regulations are necessary conditions for the market to gain sufficient consumer confidence).
[159] 47 U.S.C. § 336(b)(5) (emphasis added).
[160] *See FNPRM* at ¶17.

update the record and continue to advise the Commission regarding how to develop the existing public interest obligations to match the capacity of new technologies. In order to further the Commission's ability to assess the state of DAB development and how rules affect the industry, it is imperative that the Commission order research studies to be conducted by independent entities.

Presently the FCC relies on data voluntarily offered by the industry. While this data may be somewhat informative, it clearly is submitted to further the interests of the entities that submit it. Moreover, each corporation submits data in a different format, making comparisons across data difficult. The data is not compiled in a manner that would aid independent academic research. The Bush Administration has recently developed an initiative encouraging federal agencies to rely upon data that has been peer reviewed.[161] Because most of the data presently relied upon by the FCC is proprietary and thus unavailable for others to use, the data relied upon by the FCC would fail this criterion in almost all instances.

Collecting suitable data need not be difficult, particularly if the Commission made good use of sound statistical sampling, which would allow the Commission to get a snap shot of the industry without seeking information from each and every broadcaster. The Commission made some headway in this area when it procured information in the context of its *2002 Media Ownership Biennial Review*.[162] While some of the studies suffered from serious limitations, others were better developed. In that case the Commission did not consider sufficiently, nor did

---

[161] *See* Office of Management and Budget, *Revised Information Quality Bulletin for Peer Review* (April 15, 2004) found at http://www.whitehouse.gov/omb/inforeg/peer_review041404.pdf (last visited Jun. 14, 2004) (describing *inter alia* the value that independent reviewers with no conflict of interest bring to a review of complex conclusions); *see also* ABA Administrative Law Section article [get full cite].

[162] *See* FCC Media Ownership Working Group Studies, *available at*: http://www.fcc.gov/ownership/studies.html (last visited Jun. 14, 2004).

it adequately provide, for public and academic access to the data. The Commission should go further in this proceeding and collect rigorous, public, statistically sound data on the digital radio transition.

C. Boosters and translators.

The Commission sought comment regarding whether the rules for FM booster or translator stations should be altered through the transition to digital radio.[163] Presently the Commission's rules require commercial stations to obtain signals for most boosters and translators over-the-air.[164] This rule has the effect of ensuring a local connection between a translator and a local community – the translator must be close enough to the originating station to pick up the signal over the air. Noncommercial FM stations are exempt from this requirement. As a result, there are some noncommercial translators that do not broadcast local programming, but instead receive all of their programming from a satellite link. The Coalition does not believe that stations that receive their programming over a satellite link serve the public interest as well as a station that creates its programming locally.

In the *FNPRM*, the Commission states that the over-the-air requirement may no longer make sense technologically because digital boosters and translators may not be able to retransmit a signal unless they are within 14 miles of the original signal, a significantly shorter distance than is presently feasible in the analog world.[165] The Commission asks whether new rules should be adopted.

The Coalition feels strongly that the rules should be updated for several reasons. First, it is imperative that most translators and boosters continue to operate as they do now. Translators

[163] *FNPRM* at ¶¶54-55.
[164] *FNPRM* at ¶55 (citing 47 C.F.R. § 74.1231(b)).
[165] *FNPRM* at ¶54.

and boosters offer an important opportunity to provide service to unserved areas, particularly in remote locations typically in the western U.S. where population centers are separated by large distances. However, the Coalition feels that the disparate treatment of noncommercial and commercial broadcasters in this instance does not fulfill an appropriate policy goal. In short the broad-based exemption for all noncommercial broadcasters has meant that some noncommercial services are not connected to their communities.[166]

The Coalition proposes a single rule for noncommercial and commercial broadcasters that continues the present policy in commercial broadcasting, requiring a link between a translator or booster and a local community, tempered with an exception to ensure commercial and noncommercial service in remote areas that otherwise would not be served. Specifically, the Coalition suggests the Commission allow translators and boosters to rebroadcast a main signal if they are within 100 miles of the originating signal. In addition, the Commission would allow rebroadcasting of the originating signal at farther distances if the translator or booster met any of the following criteria. They would be allowed to rebroadcast if they were offering the first or second commercial or noncommercial service to an otherwise unserved area,[167] or, if they met the definition of a "rural service network" under the Corporation for Public Broadcasting's Rural Listener Access Incentive Fund.[168] This definition would encompass services that have been identified as offering a much-needed radio service to rural areas.

---

[166] The exception is for broadcasters using "fill-in" translators.

[167] *See generally* Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order, 15 FCC Rcd 7386 (2000) (adopting preferences for service to unserved areas).

[168] CPB defines "rural service networks" as "a CPB designated rural grantee serving multiple coverage areas with multiple transmitters and receiving, in most cases, a single CSG. An example would be a state or regional network operating more than one transmitter in separate geographic locations with minimal overlap between signals must provide at least one second service to a community of license where they currently operate a full power transmitter." *See*

CONCLUSION

We respectfully request that the Commission take action in accordance with the views and data submitted in these Comments.

Respectfully Submitted,

___/s/_____
Cheryl Leanza, Esq.
Media Access Project
1625 K Street, NW Suite 1000
Washington, DC 20006
(202) 454-5683

Karen Henein, Esq.
Angela J. Campbell, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9545

Counsel for Public Interest Coalition

Dated: June 16, 2004

Rural Listener Access Incentive Fund FY2004 Information, *available at*: https://sgms.cpb.org/help/SGMS_HELP_PROJ/WebHelp/Rural_Listener_Access_Incentive_Fund.htm (last visited Jun. 15, 2004).